Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-405

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

TRAN CON CORPORATION
d.b.a. The Palladium,
Petitioner

vs.

THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,
Respondents

BAXTER RICE, as Director of the
Department of Alcoholic Beverage Control,
Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI
to the California Court of Appeals
First Appellate District

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QUESTIONS PRESENTED

1. Does the Department of Alcoholic Beverage Control licensing and regulatory scheme to which Petitioner is subject violate Petitioner's right under the First Amendment to the United States Constitution, by regulating the content of Petitioner's speech absent a compelling state interest, absent any clear and present danger of substantive evil, and by virtue of its over broad application?

2. Does the arbitrary and selective enforcement of the Alcoholic Beverage Control licensing and regulatory scheme as against this petitioner invidiously deny Petitioner the equal protection of the laws as guaranteed by the Fourteenth Amendment?

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No.

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vs.

THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,
Respondents

BAXTER RICE, as Director of the
Department of Alcoholic Beverage Control,
Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI
to the California Court of Appeals
First Appellate District

To the Honorable, the Chief Justice and Associate Justice of the Supreme Court of the United States.

Tran Con Corporation, d.b.a., The Palladium, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeals, entered in the above case on June 25, 1980.

DECISIONS BELOW

The decision of the Court of Appeal denying Petitioner's petition for writ of review is unreported and issued summarily. A copy is attached hereto in Appendix A. The

decision of the California Supreme Court denying Petitioner's petition for hearing summarily, is unreported, and it attached hereto in Appendix A. Decisions of the Alcoholic Control Appeal's Board and Department of Alcoholic Beveral Control are too voluminous to append hereto and are presented separately.

JURISDICTION

Judgment of the Alcoholic Beverage Control Appeals Board was entered on April 30, 1980. A petition for writ of review was filed by Petitioner on May 30, 1980, and was denied by the California Court of Appeal, First Appellate District on June 25, 1980, with one Justice dissenting. A petition for hearing before the California Supreme Court was thereafter filed and the same was denied on August 6, 1980.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (Emphasis added.)

Section I of the Fourteenth Amendment to the United States Constitution provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added.)

STATUTE INVOLVED

Title IV of the California Administrative Code, section 143.3, at issue in the case at bar, reads as follows:

"Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or the fondling of the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breast and/or buttocks are exposed to view perform only upon a stage at

least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect to the invalid provision or application and to this end the provisions of the rule are severable."

STATEMENT OF CASE

Respondents in this proceeding are the Alcoholic Beverage Control Appeals Board (hereinafter "Board"), which is the appellate board of the Department of Alcoholic Beverage Control, (hereinafter "ABC"), a duly and regularly constituted agency of the State of California, and Baxter Rice, as Director of the ABC.

Petitioner is the Tran Con Corporation, doing business as the Palladium, a dinner theater in San Francisco, principally owned and operated by its president and majority stock holder, Samuel J. Conti.

Multiple accusations were filed by agents of the San Francisco Bureau of the ABC, on December 13 and December 29, 1977, and on January 3, 1978 and March 21, 1978 charging Petitioner with violations of, *inter alia,* U.S. 143.3

and 143.3(1)(c) of Title IV of the California Administrative Code. Petitioner specifically denied all parts of the accusations and requested a hearing. At such hearing, the ABC found that Petitioner had violated the aforesaid sections, suspended Petitioner's license for a period of three years upon condition, with suspended sentence. Specifically, the accusations charged that Petitioner served alcoholic beverages to patrons at its dinner theater during the performance of the stage show, "Let My People Come", which show incorporated nudity within its format.

Thereafter, on August 21, 1980, the Board issued its notice imposing commencement of sentence which was the suspension imposed in these consolidated cases and which was to commence on or after September 4, 1980. At this time, Petitioner's counsel had been advised that pending this Court's determination on this Petition, imposition of sentence will be temporarily stayed.

Petitioner has never disputed that it served on its licensed premises, alcoholic beverages, during the performance by the San Francisco Company of the stage show "Let My People Come", which performance involved the exhibition of male and female nudity on the licensed premises. Petitioner has always contended and so contends that the stage production is legitimate theater. The characterization of such performance as legitimate theater by the uncontradicted testimony of a well-known theatrical critic, the late John Wasserman, indicates that it is in fact a dramatic performance with a message to be delivered, however, inexpertly or inartfully delivered the same may have been. The show was a parody or satire of present sexual roles,

mores and morals. It was not, and has never been, mere nude exhibitionism. The subject performance presented a theme, developed, commented on it, and promulgated a conclusion.

The findings of fact of the Administrative Law Judge pursuant to Hearing, and which findings of fact were adopted by the ABC, and thereafter, by the Board, were that the production, while lacking in quality, was nonetheless legitimate theater. (R.T. 9/13/78, 34:21-58:2).

Petitioner also produced evidence of discriminatory enforcement which was documented in part by the testimony of ABC personnel. (R.T. 9/14/78, 20:23-32:11; R.T. 9/14/78, 68:8-83:27; R.T. 9/13/78, 158:21-182:17). Evidence of this discriminatory enforcement consisted of evidence of the unequal application of selective enforcement of the law, to wit, that a similar production of the same show had been allowed to complete its "run" in Los Angeles without departmental interference. (R.T. 9/13/78, 4:18-23:6). Evidence was further produced that adjacent establishments in the North Beach area of San Francisco engaged in the business of presenting nudity and simulated sexual performance while coterminously providing patrons with alcoholic beverages.

The issues of First Amendment and Fourteenth Amendment rights and the method by which California Administrative Code section 143.3 impinges upon those rights have been raised at all stages of the proceedings. Those claims have been found lacking in merit by the tribunals at each stage of the proceedings.

REASONS FOR GRANTING THE WRIT

This case concerns the right of the Petitioner to present verbal and visual social commentary of the theatrical variety without content regulation, absent compelling state reasons to so regulate the content, and absent a clear and present danger of some substantive evil which might arise from such presentation.

This case further concerns the selective, arbitrary, and invidious discriminatory enforcement, as against Petitioner, of the ABC regulations cited hereinbefore, specifically, California Administrative Code section 143.3. That code, Petitioner submits, serves to regulate the content of the particular stage production on Petitioner's premises wherein alcoholic beverages are served.

Respondents rely upon the case of *California v. La Rue* (1972) 409 U.S. 109, 93 S.Ct. 390, wherein this Honorable Court determined that the licensing regulations prohibit licensed bars and night clubs from displaying nudity, either in the form of movies or live entertainment where liquor is served on the premises. This Court explained *La Rue* in *Craig v. Boren* (1976) 429 U.S. 190, 50 L.Ed. 2d 397, noting that *La Rue* proscribed those performances which partake more of gross sexuality than of communication. In the *La Rue* decision, which Petitioner submits should be reconsidered in view of the substantial and distinct difference between the disruptive conduct there noted, and the present case, this Court found:

> "References to the transcript of the hearing submitted by the Department to the District Court indicated that in licensed establishments where 'topless' and 'bottomless' dancers, nude entertainers, and films

displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers in the vaginal areas of female performers were reported to have occurred.

"Prostitution occurred in and around some such licensed premises and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself and assault on police officers took place on or immediately adjacent to such premises." *Id.* at 111.

In sum, then, the regulatory scheme set forth in *La Rue* was directed to raucous, disruptive, and otherwise penally sanctioned behavior.

There is absolutely no indication in the present records that any raucous, disruptive or otherwise destructive or illegal behavior occurred in, during, or as a result of the presentation of the stage performance on this Petitioner's premises.

In its findings, the Board found that its production was a bona fide, legitimate production engaging professional actors, singers, and dancers and was presented on the premises with a live band. The Board further found that production had a libretto score, printed illustrated program; a producer, a director, and a full staff of technicians such as is usually and customarily employed in musical

stage productions. The Board further found that identical productions had been shown in New York and in Los Angeles prior to presentation of the production in San Francisco.

The performers and the producers, to wit, the Petitioner, are engaged in what is undoubtedly legitimate First Amendment activities.

Thus, under the aegis of attempting to control the distribution of alcoholic beverages, the ABC has assumed a censorship role of the quality of expression within a specific commercial establishment, and by doing so has regulated the content of speech and expression by those parties there performing. ABC has in essence attempted to characterize and proscribe under the aegis of its admittedly broad licensing and regulatory powers, expression that it finds obscene without presenting the showing required in *Miller v. California* (1973) 413 U.S. 15, 93 S.Ct. 2607. *Miller* requires that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; depicts sexual conduct in a patently offensive way; and lacks serious literary, artistic, politicai, or scientific value. Simply put, the regulations promulgated by ABC reach protected conduct and speech as well as unprotected conduct and speech.

The subject regulations have reached and proscribed noncommunicative conduct, such as waitressing, *Locker v. Kirby* (1973) 31 Cal.App.3d 520; bawdy atmospheres and lewd acts, as in *La Rue, supra;* but they have reached and

inhibited legitimate theater as well. Never was there a claim made by ABC that the performance on Petitioner's premises, either on stage, or in any interactions between entertainers and audience, resulted in any acts of "gross sexuality"; nor was it in fact denied by the ABC that the subject performance possessed communicative intent, effect, content and value. Where a regulatory scheme punishes protected conduct as well as acts which may validly be prohibited, it is overbroad. *Baggett v. Bullit* (1964) 377 U.S. 360, 12 L.Ed. 2d 377.

In *Craig v. Boren* (1976) 429 U.S. 190, 50 L.Ed 2nd 397, this Court explained that such cases as *La Rue*:

> ". . . relied upon the Twenty-First Amendment to strengthen the State's authority to regulate live entertainment at establishments licensed to dispense liquor, *at least when the performances partake more of gross sexuality than of communication*, . . ." *Id.* at 207 (Emphasis added.)

The ABC regulations then, require Petitioner to forego the exercise of certain rights guaranteed by the First Amendment, to wit, the presentation of social satire and commentary by imposing a condition, which Petitioner submits is an unconstitutional condition, upon the retention of Petitioner's license.

Petitioner is a commercial establishment, and as such *La Rue* should be reconsidered as well in light of recent decisions concerning application of the First Amendment to commercial enterprises. Reservations were expressed concerning the expanse of the regulations in issue in

Locker, supra, where the California Court of Appeal for the Second District stated:

> ". . . the work of a waitress serving drinks to bar customers *is surely much less susceptible of being classed with the expression of ideas and the communication of impressions than is the performance of an entertainer on the stage.* . . . Indeed, the petitioners in La Rue . . . conceded that topless waitresses are not within the protection of the First Amendment . . . for these reasons . . . we hold that Rule 143.2 does not on its face violate any rights of petitioners. . . ." *Id.* at 524 (Emphasis added.)

Locker was concerned with the regulation of topless waitressing and not the presentation of a dramatic theatrical performance as at issue in the present case.

In light of the foregoing, Petitioner submits the production was clearly a protected activity and where protected activities have been subject to ABC regulations which are otherwise valid, the regulations have fallen. *See Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 95 Cal.Rptr. 329.

The ABC seeks to justify its regulations by viewing itself as guardian of the public morality. It is attempting to ban theatrical expression presented by Petitioner merely as a matter of taste, and to inhibit adequate expression of the ideas (promulgated in the subject stage production) that communicate intensity of feeling and emotion about those ideas.

Petitioner asks then whether the primary impact of these regulations is to restrict communication of ideas, and verbal and visual expression, or to protect other non-

speech values of the community, and if so, whether the nonspeech interests are sufficiently important to justify interfering with freedom of expression that results from the regulation. Petitioner submits that the impact of the regulations as applied to Petitioner restricts the communication of ideas that no showing of any substantive evil or clear and p. esent danger requiring the protection of non verbally expressive values of the community has been made.

It is a well settled rule of law that the validity of a statutory punishment premised upon the exercise of speech and expression is whether or not the speech creates a clear and present danger of a serious substantive evil which the State has the right to prevent. The State, and in present case, the ABC, must utilize just such an approach where it seeks, as here, to accomplish a particular objective through the regulation of expression which in practical effect discourages and impairs freedom of expression both of the actors and the patrons of Petitioner's establishment.

In his concurring opinion in *Brandenberg v. Ohio* (1969) 395 U.S. 444, 89 S.Ct. 1827, the pillarstone of the clear and present danger test, Justice Douglas determined that the line between what is permissible and not subject to control, and what may be impermissible and subject to regulation, is the line between ideas and overt acts The ABC presented no evidence that the stage production in issue has produced any clear and present danger to society, nor has it even produced any action dangerous to public security, *Gitlow v. New York* (1925), 268 U.S. 652, 45 S.Ct. 625, nor is any tendency to engage in the raucous, bawdy and

disruptive behavior specifically delineated in *La Rue, supra.* There is no showing that the prevention of bawdy conduct resulting in breaches of the public peace is present and were such the case the same must be substantial under the *Brandenberg* test.

Petitioner presented witnesses and testimony that the subject performance was unhindered by ABC accusations during its theatrical showings in Los Angeles, where ABC agents were even present for preview production. Further, the ABC was well aware of but failed to exercise its enforcement powers against adjacent "clubs" in the San Francisco Bay Area's North Beach section, which simultaneously serve alcoholic beverages while simultaneously allowing its employees to display buttocks, genitals, pubic hair, and to simulate sexual performances.

Petitioner refers this Court to the case of *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 30 L.Ed. 220, which involved the application of administrative licensing procedures in the City of San Francisco for the issuance of business licenses and clearly showing that the licensing scheme was discriminatorily enforced. While that statute was entirely neutral on its face, a clear showing of differential application of the laws was there made as was set forth in testimony presented here Such differential application is every bit as unconstitutional in 1978 or 1980 as it was in 1886. While it is true that no statute or judicial action or administrative action is void merely because it discriminates, it will so be void when the discrimination is *arbitrary.* Again, substantial testimony was presented that Petitioner's establishment was singled out for enforcement of Rule

143.3. No testimony was presented that the presentation by Petitioner of the subject theatrical performance caused the evil for which the ABC purported to require prevention. Thus, no rational basis exist for the revocation of Petitioner's license. The mere fact that the discriminatory treatment accorded Petitioner by the ABC under the aegis of California Administrative Code section 143.3 is arguably related to a legitimate state objective or interest is insufficient; the relationship must be rational in a sense that the deprivation imposed upon Petitioner, to wit, revocation of Petitioner's license, and consequently, livelihood, must be reasonably justified by persuasive and sufficient state interest that cannot effectively be achieved without discriminating solely against Petitioner.

Murgia v. Municipal Court (1975) 15 Cal.3d 286, holds that:

> " . . . the allegedly 'inequal' treatment which may result from simply laxity or enforcement, or a non-arbitrary selective enforcement of a statute has never been considered a denial of equal protection." *Id* at 296.

Again, substantial evidence was presented as to the arbitrary enforcement of section 143.3 as against Petitioner, and consequently the proscriptions against selective enforcement defined and discussed in *Murgia* are applicable in the case at bar.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the California Court of Appeal, First Appellate District in *Tran Con Corporation, d.b.a. The Palladium, Petitioner, v. The Alcoholic Appeals Board, Respondents; Baxter Rice as the Director of the Department of Alcoholic Beverage Control, Real Party In Interest.*

In the event that the petition is granted, Petitioner prays that the judgment of the Court below be reversed, that the cause be remanded and that the Court below be directed to issue the Writ of Review as prayed.

Dated: September 12, 1980

Respectfully submitted,

HENRY SHAIN
Counsel of Record

(Appendices follow)

Appendix A

Court of Appeal of the State of California
In and for the
First Appellate District

Division Two

No. 49714

Superior Court No.

Tran Con Corp. dba The Palladium,
Petitioners,

vs.

Alcoholic Beverage Control Appeals Board,
Respondent,

Baxter Rice, as Director of the Department of Alcoholic Beverage Control,
Real Party in Interest.

[Filed June 25, 1980]

BY THE COURT:

The petition for writ of review is denied.

(Miller, J. is of the opinion that the petition should be granted.)

Dated Jun 25 1980

TAYLOR, P. J.

A-2

Clerk's Office of the Supreme Court
San Francisco, California 94102

Aug 6 1980

I have this day filed Order

Hearing Denied

In re: 1 Civ. No. 49714

Tran Con Corporation

vs.

Alcoholic Beverage Control Appeals Board

Respectfully,

Clerk

Appendix B

Before the Department of Alcoholic Beverage Control
of the State of California

AB-4742
File 37664
Reg. 9325

In the Matter of the Accusation Against

Tran-Con Corporation
The Palladium
1031 Kearny Street
San Francisco

on-sale general license

Respondent

under the Alcoholic Beverage Control Act.

ORDER SETTING OPERATIVE DATE

The Supreme Court having denied hearing in a sister case to the above matter under Registration 9728, the penalty ordered by the Department of Alcoholic Beverage Control on June 12, 1980, in the above matter will become operative on the same date as the penalty under Registration 9728 and run concurrently therewith.

CERTIFICATE

It is hereby certified that on August 21, 1980, the Department of Alcoholic Beverage Control adopted the foregoing as its order in the proceedings therein described.

Sacramento, California
Dated: August 21, 1980

C. E. Cameron, Jr.
C. E. CAMERON, JR.
Chief Counsel

Before the Department of Alcoholic Beverage Control
of the State of California

File 37664
Reg. 9728

In the Matter of the Accusation Against

Tran-Con Corporation
The Palladium
1031 Kearny Street
San Francisco

on-sale general license

Respondent

under the Alcoholic Beverage Control Act.

NOTICE

The Alcoholic Beverage Control Appeals Board having affirmed the decision of the Department of Alcoholic Beverage Control in the above matter and the Supreme Court having denied hearing therein, the decision of the Department dated October 4, 1979, is now final.

The 45-day suspension imposed in said decision shall be served following the suspension imposed in Registration 9159.

Sacramento, California
Dated: August 21, 1980

C. E. Cameron, Jr.
C. E. CAMERON, JR.
Chief Counsel

Before the Department of Alcoholic Beverage Control
of the State of California

File 37664
Reg. 9159

In the Matter of the Accusation Against

Tran-Con Corporation
The Palladium
1031 Kearny Street
San Francisco

on-sale general license

Respondent

under the Alcoholic Beverage Control Act.

NOTICE

The Alcoholic Beverage Control Appeals Board having affirmed the decision of the Department of Alcoholic Beverage Control in the above matter and the Supreme Court having denied hearing therein, the decision of the Department dated August 16, 1979, is now final.

The 30-day unstayed portion of the suspension imposed therein shall be served beginning on or after September 4, 1980.

Sacramento, California
Dated: August 21, 1980

C. E. Cameron, Jr.
C. E. CAMERON, JR.
Chief Counsel

Before the Department of Alcoholic Beverage Control
of the State of California

In the Matter of the Accusation Against

Tran-Con Corporation
dba The Palladium
1031 Kearny Street
San Francisco, CA 94133

On-sale general license

Under the Alcoholic Beverage Control Act.

[Filed April 30, 1980]

AB-4727
File 37664; Reg. 9159
ALJ: Robert S. Kendall (w:s)

Date and Place of Hearing:
January 3, 1980
350 McAllister Street
San Francisco, CA

For Department:
George Deukmejian, Attorney Gen.
Gordon Zane, Deputy Attorney Gen.

For Appel: Jeff Zimmerman, Atty.

Tran-Con Corporation, doing business as The Palladium, has appealed a decision of the Department of Alcoholic Beverage Control, issued under the provisions of Government Code section 11517(c), which determined:

"I. By reason of the foregoing facts, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code.

"Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that respondent has violated, or permitted the violation of Title 4, California Administrative Code, Rule 143.3 and 143.3(1)(c).

"II. The Department is not, and was not, estopped from the filing of the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent.

"III. The motion of the Department of Alcoholic Beverage Control to quash service of process requiring the attendance at the hearing and the testimony of Baxter Rice, Director, Department of Alcoholic Beverage Control, previously granted, is hereby confirmed."

The department's decision suspended the license for 60 days, with 30 days thereof stayed for a period of one year upon condition.

The decision further provides:

"FINDINGS OF FACT:

"I

"A. On December 29, 1977, during a performance of a musical stage production entitled "Let My People Come,"

(LMPC), AURISTELA FRIAS, NANCY FROELICH, EMPRESS KILPATRICK, CHRISTINE RUBENS and CLAUDIA TALBOT did display their pubic hair to the audience in the premises.

"B. On December 29, 1977, during the performance of a musical stage production "Let My People Come," RAY COLBERT, BOB JOCKERS, JOE JONES, JOHN PONYMAN and JOHN-DAVID YARBROUGH did display their pubic hair and did expose their genitals to the audience in the premises.

"C. On January 3, 1978, during a performance of a musical stage production entitled "Let My People Come," AURISTELA FRIAS, NANCY FROELICH, EMPRESS KILPATRICK, CHRISTINE RUBENS and CLAUDIA TALBOT did display their pubic hair to the audience in the premises.

"D. On January 3, 1978, during the performance of a musical stage production entitled "Let My People Come," RAY COLBERT, BOB JOCKERS, JOE JONES, JOHN POLYMAN and JOHN-DAVID YARBROUGH did display their pubic hair and did expose their genitals to the audience in the premises."

"II

"a) It was established that on December 13, 1977, representatives of the Northern California Division, Department of Alcoholic Beverage Control (DABC), including Department counsel and the San Francisco District Administrator, previewed a performance of LMPC at the licensed premises. At that time, the Corporate President and major

stockholder of the licensee, Samuel J. Conti (Conti), was advised by these officials it was their consensus the display of genitalia and pubic hair observed during the performance would result in accusations being filed against the license for violation of Title IV, California Administrative Code, Rule 143.3 (Rule), if the displays were continued during future performances of LMPC at the premises.

"b) It was established that on dates not ascertained, but around the time of the preview above referred to and thereafter on subsequent contacts with various Northern Division and San Francisco District DABC employees, Conti informed them the exact, identical production of LMPC had been permitted to be performed in a DABC licensed premises in Los Angeles; namely, the "Whiskey-A-Go-Go" for several months during 1975-1976.

"Conti also told the Northern California DABC officials that Southern California DABC officials had also previewed the "Whiskey-A-Go-Go" LMPC presentation, and had not thereafter filed accusations during its run, or put that licensee on notice of probable violations of the Rule, then or thereafter.

"(c). It was established that on a date not ascertained, but after the events related in (a) and (b) above, Conti contacted the Director of the Department of Alcoholic Beverage Control in Sacramento by phone to express his dismay and anger at what he considered discriminatory enforcement, as well as unequal application, of the rule in Northern California contrasted to Southern California, by Northern California Department of Alcoholic Beverage Control authorities.

"Conti testified Director Rice subsequently called him to advise of the results of his investigation of Conti's allegations that Southern California Department of Alcoholic Beverage Control had at least tacitly approved the showing of "Let My People Come", despite purported Rule 143.3 violations. According to Conti, Rice told him the Southern California Department officials advised they had learned of the "Whiskey-A-Go-Go" "Let My People Come" production only three days before it was scheduled to close. Therefore, the Department had permitted the purported rule violations to continue in view of its imminent closing. No rebuttal testimony or evidence concerning this portion of Conti's testimony was received.

"It is found that "Whiskey-A-Go-Go" was, in fact, a Department licensed premises when "Let My People Come" played there, and that violations of Rule 143.3 involving display of genitalia and pubic hair occurred during that production.

"It was not established that Rice or any other Department official tacitly, expressly, or in any other manner, thereby approved any violations of Rule 143.3 by Conti during the run of "Let My People Come" in San Francisco.

"d) It is found that before service of any of the accusations here in issue, a DABC representative personally delivered a copy of the Rule to Conti. On each occasion when DABC personnel came to the premises to observe performances of LMPC, they made their presence and purpose known to Conti or to other corporation employees.

"It was established that service of each accusation arising out of observations of the DABC personnel of viola-

tions of the Rule on these visitis, was timely and properly made on Conti before additional observations were made or accusations registered.

"e) It is found throughout the sequence of events set out above, it was Conti's good faith conviction and belief that:

"1. The Rule was overbroad and was not applicable to the presentation of LMPC in the licensed premises because it (the Rule) did not contemplate, or take into account, theatrical nonsexual use of nudity in bona fide, legitimate theatrical prdouctions. For example, in grand opera presentations of Salome, or African Native folk dance performances presented at the San Francisco Opera House where licensed service of alcoholic beverages is permitted, in the past had shown frontal nudity;

"2. The Department of Alcoholic Beverage Control was discriminatorily enforcing Rule 143.3 against his corporate license because he had personally observed in other licensed premises in the North Beach area where the Palladium is located, what, in his opinion, were widespread, frequent, continuing, flagrant and aggravated abuse of the Rule against displays of genitalia and pubic hair;

"Conti also concluded, because of his general, personal knowledge of North Beach area activity, that these other licensees were not being investigated by the DABC; nor were accusations being registered against them for Rule violations; whereas, he was being investigated;

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"f) Based upon the above, Conti willfully permitted the presentation of "Let My People Come" to violate the rules of the Department of Alcoholic Beverage Control."

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"b) Identical productions LMPC had been shown for an unascertained period in a New York theater prior to opening in the "Whiskey-A-Go-Go," in Los Angeles in late November, 1975 where it closed in late March, 1976.

"c) LMPC opened an identical production, except for a new cast, at the Palladium in San Francisco in December 1977. It closed at approximately the end of August, 1978.

"d) LMPC consists of a series of tableaux, or acts of singing, or dancing, recitation, or combinations of these activities, performed by cast members; solo as well as up to the full company. During these sequences, as many as all or few as one of the actors, both male and/or female, in course and as part of a particular act would appear either fully or partially nude. While most actors in the cast appeared nude at times during the performance, several appeared clothed in all sequences.

"At the times when nudity occurred the genitalia and pubic hair of the nude male actors were clearly and fully exposed. No female genitalia was observed at any performance; however, the pubic hair of the females was clearly exposed.

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"A menu of full course dinners, primarily Italian in style, was available to patrons of the premises.

"Respondent Corporation invested a large sum of money in alterations and refurnishing of the premises to establish the theater format.

"b) Since opening, and prior to the booking of LMPC, respondent had presented three other stage productions which ran for varying periods. Two of these productions were: "Dressing Room," with comedian Jackie Vernon; and "Godspell," which is still touring the U.S. with a road company. Both of these productions are classifiable as legitimate theater productions.

"The premises since August 1978 has been converted into and is operating as a discotheque but is capable to conversion back to a theater format."

"Licensed as above since July 21, 1977, with no record of any disciplinary action. Accusation filed December 22, 1977, Reg. 9081, violation Rule 143.3 and 143.3(1)(c), pending."

Appellant appeals upon the basis of Business and Professions Code section 23084.

In its opening brief, appellant indicates it does not contest the department's findings that nudity was exhibited in the licensed premises by males and females on stage and that alcoholic beverages were being served during said performances (Opening Brief of licensee, page 2 and page 1 of incorporated argument).

Upon appeal appellant contends: the factual findings of the department's decision are incomplete as to the issue of discriminatory design and enforcement of Rule 143; enforcement of the accuasation violates the guaranteed equal protection of the laws, in that an identical performance was unhindered by the department during its showing in Los Angeles, which the department was well aware of, but failed to file accusations against, as well as other rule violators in San Francisco, and that there was evidence showing a clear motive of harassment on the part of the department regarding the license owners' associational activities (citing *Murgia* v. *Municipal Court,* 15 Cal.3d 286; *People* v. *Superior Court* (*Hartway*), 19 Cal.3d 338, *Craig* v. *Boren,* 429 U.S. 190 [50 L.Ed. 2d 397]; and, *Yick Wo* v. *Hopkins*, 118 U.S. 356 [30 L.Ed. 220]); the underlying regulations are unconstitutionally vague, in that California Administrative Code, Title 4, section 143.3, does not clearly proscribe the illegal conduct and give fair notice (citing

Papachristou v. *Jacksonville,* 405 U.S. 156 [31 L.Ed. 2d 110]; *NAACP* v. *Button,* 371 U.S. 415 [9 L.Ed. 2d 405]; *Baggett* v. *Bullitt,* 377 U.S. 360 [12 L.Ed. 2d 377]; and, *Winters* v. *New York,* 333 U.S. 507 [92 L.Ed. 840]); the subject regulatory scheme is void for overbreadth, violating the First Amendment, in that department Rule 143.3 punishes constitutionally protected conduct as well as acts which may be validly prohibited (discussing *Baggett* v. *Bullitt,* supra; *NAACP* v. *Button,* supra; *LaRue* v. *California,* 409 U.S. 109 [34 L.Ed. 2d 342]; *Boreta* v. *Department of Alcoholic Beverage Control,* 2 Cal.3d 85; *Locker* v. *Kirby,* 31 Cal.App.3d 520; *Rice* v. *ABC Appeals Board,* 21 Cal.3d 431; *Marsh* v. *Alabama,* 326 U.S. 501 [90 L.Ed. 265]; *Crownover* v. *Musick,* 9 Cal.3d 405; *Craig* v. *Boren,* 429 U.S. 190 [50 L.Ed. 2d 397]; *Virginia State Board* v. *Virginia, etc., Council,* 425 U.S. 748 [48 L.Ed. 2d 346]; *Bates* v. *State Bar,* 433 U.S. 350 [53 L.Ed. 2d 810]; *Welton* v. *Los Angeles,* 18 Cal.3d 497; *Linmark Associates* v. *Willingboro,* 43 U.S. 85 [52 L.Ed. 2d 155]; *Sail'er Inn* v. *Kirby,* 5 Cal.3d 1; *Doran* v. *Salem Inn, Inc.,* 422 U.S. 922 [45 L.Ed. 2d 648]; *Younger* v. *Harris,* 401 U.S. 37 [27 L.Ed 2d 669]; and, *United States* v. *O'Brien,* 391 U.S. 367 [20 L.Ed. 2d 672]).

Appellant's contention that California Administrative Code, Title 4, section 143.3[1], is unconstitutionally void for vagueness is without merit.

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[1]Section 143.3 states:

"Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

The section of Rule 143.3 which the department's finding indicates the licensee was found to have violated herein (Finding I: A, B, C and D), reads in precise language, and does not allow a licensee to permit the displaying of "pubic hair", "anus" or "genitals" in his licensed premises. In view of the admission in appellant's brief that the subject male and female performers were nude, there is no real issue herein concerning preciseness, hence, any issue with regard to what would constitute exposure on this record

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"Live entertainment is permitted on any licensed premises, except that:

"(1) No Licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable."

is not relevant. Moreover, in regard to the specific aspects of the rule which were violated, it is clear the rule is quite precise. Either the above aspects of the human anatomy are displayed or they are not displayed.

Appellant's contention an unrelated subsection of 143.3, subsection (b), is void as it does not define "touching", is based on a speculative enforcement pattern suggested in arguments but not shown in the department's decision as to the violations found, which does not mention any "touching". Speculation as to the possible unreasonable administration or enforcement of a statute or regulation is not a sufficient ground for holding it unconstitutional (in re *Monks Estate,* 48 Cal.App.2d 603; *People* v. *Hicks,* 222 Cal.App.2d 265). Moreover, it is a well settled rule of law that a party must show that his rights are injuriously affected by the law before he can raise a constitutional question with regard thereto (in re *Doran,* 6 Cal.App.2d 69, 70 [44 P2d 367]; in re *Creglar,* 56 Cal.2d 308, 313 [363 P.2d 305]). The courts are also not required to consider every conceivable situation thereunder (*Bowland* v. *Municipal Court,* 18 C.3d 479).

Appellant's contention the subject regulation at issue herein is overbroad is likewise without merit. There is no legal authority which holds the proscribed conduct must result in "raucous or disruptive" behavior, as claimed by appellant, in order to be enforced by the department.

The provisions of the rule herein applied were upheld in *California* v. *LaRue,* 409 U.S. 109 [93 S.Ct. 390], wherein it was held that Rule 143.3, which prohibits the sale of liquor by the drink in premises where there were nude, but not

necessarily obscene performances, is constitutional. In *LaRue* it was stated:

> "But we do not believe the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, *or in accordance with the limits proscribed for dealing with some forms of communicative conduct in O'Brien.*" (Emphasis added; 409 U.S. 116.)

The *LaRue* decision held the regulatory scheme herein to be constitutional. It was not found to be overbroad or a violation of the First Amendment. Moreover, the subject rule has been applied many times by the department and it has never been indicated by the courts that destructive or disruptive behavior would be necessary to show a violation thereof (*California* v. *LaRue,* supra, 409 U.S. 109; *Doran* v. *Salem Inn, Inc.,* 95 S.Ct. 2561; *Kirby* v. *ABC Appeals Board and 552 Broadway, Inc., et al.,* 47 Cal.App. 3d 360). The pertinent rule in question is not content, but conduct, related; in *Crownover* v. *Musick,* 9 Cal.3d 405, the Supreme Court indicated municipal ordinances proscribing the state of dress in public places were constitutional and not a violation of the First Amendment; the department rule does not go so far; it only applies to the exposure of one's private parts in on-sale licensed premises.

Appellant's further contention that a statute or regulatory scheme which is vague or overbroad will always be struck down by the courts is not correct. The California Supreme Court in *Pryor* v. *Municipal Court,* 25 Cal.3d 238, recently stated, in September of 1979, that "the judiciary bears an obligation to 'construe enactments to give specific

content to terms that might otherwise be unconstitutionally vague.' (citations omitted.)"

Moreover, *California* v. *LaRue,* supra, supports this department decision because the acts found in violation were performed in a licensed premises; and, the rule applied to appellant concerns the exposure of genitals and pubic hair; it has nothing to do with songs or other communicative content. The evidence indicates the department informed the licensee it could surrender the license during the performances or cover up the entertainers' pubic hair and genitalia.

The testimony in this record describing the performances does not indicate how covering the pubic hair and genitals of the participants would thwart communication. Clearly this is a rule which reasonably regulates the time, place, and manner of certain performances, as specifically permitted in *Welton* v. *City of Los Angeles,* 18 Cal.3d 497, cited by appellant. Moreover, the subject rule does permit the exposure of breasts and buttocks, which was not the case in *Doran* v. *Salem Inn, Inc.,* 422 U.S. 922, 45 L.Ed.2d 648, discussed by appellant; *Doran* permits the banning of nudity in alcoholic beverage licensed premises. Herein we are concerned with the right to sell alcohol by the drink and the consumption by the public thereof in the same room where the live performance is being presented; accordingly, under a reasonable interpretation of the cited cases, the department rule is reasonable, precise and constitutional.

Appellant's contentions the department denied it equal protection of the laws by enforcing the accusation and that the accusation resulted in discriminatory enforcement with regard to appellant are devoid of merit.

In *People* v. *Superior Court (Hartway)*, 19 Cal.3d 338, cited by the appellant, the court pointed out that because of the presumption that an official duty has been properly, hence constitutionally, performed (citing Evidence Code section 664), a defendant has the burden of proof in establishing the defense of discriminatory enforcement of the law (citing *Murgia* v. *Municipal Court*, 15 Cal.3d 286 at 305; *People* v. *Sperl*, 54 Cal.App.3d 640, 657 [126 Cal.Rptr. 907]; *People* v. *Gray*, 254 Cal.App.2d 256, 265 [63 Cal.Rptr. 211]); that the sine qua non of said defense is the deliberate singling out of the defendant for prosecution on the basis of some invidious criterion; that the prosecution would not have been pursued but for its discriminatory design.

In the instant case, the evidence does not indicate that Mr. Conti, the principle shareholder of the appellant, was singled out for discriminatory treatment. Conti's allegation of discrimination due to alleged purposeful delays in some of his five license applications and transfers is not supported by substantial evidence in the record. His testimony indicates the alleged delays were either caused by the police department filing protests, because of an invalid license to be transferred, or because of a criminal indictment pending against him (R.T. III, 131-142). Since the department has a duty to investigate protests and unfit applicants, no invidious criterion or discriminatory design has been proved (California Const., Art. XX, Section 22 and Business and Professions Code sec. 23958). Moreover, Conti admits in his testimony that he met the department investigators at the El Matador Restaurant and invited them to observe his show at the Palladium. The department representatives came to the performance and pointed

out the violations of Rule 143.3, in that appellant was serving alcohol by the drink in its premises while stage performers were clearly being permitted to expose their entire pubic area. This is not a case where the licensee's performers were simply wearing loose garments. Indeed, appellant admits it permitted performers to appear in the subject premises while nude (Appellant's Opening Brief p.2; incorporated Brief p.1). The evidence introduced by appellant at the department hearing indicated, with one or two exceptions, that other alcoholic beverage licensees in San Francisco are *not* permitting their performers to perform without a garment covering their public area. The appellant's private investigators who testified with regard to other performances occurring some months after the performance in question, indicated that, with the exception of one instance where a pegnoir was utilized, all performers had an opaque covering over their pubic area; although some were loose. Moreover, there was no evidence that the department investigators observed the pegnoir incident or when any exposure resulted from said loose garments. Furthermore, in *Murgia* v. *Municipal Court*, 15 Cal.3d 286, supra, the court stated at 296:

> "Contrary to the People's suggestion, the allegedly 'unequal' treatment which may result from simple *laxity of enforcement or the non-arbitrary selective enforcement* of a statute has never been considered a denial of equal protection."

The court also stated that:

> "As these authorities teach, *an equal protection violation does not arise whenever officials "prosecute one*

and not [*another*] *for the same act*' (cf. *People* v. *Montgomery, supra,* 47 Cal.App.2d 1, 13); instead, the equal protection guarantee simply prohibits prosecuting officials from *purposefully and intentionally singling out* individuals for *disparate treatment on an invidiously discriminatory basis.* As the Court of Appeal succinctly stated in *City of Banning* v. *Desert Outdoor Advertising, Inc.* (1962) 209 Cal.App.2d 152, 156 [25 Cal.Rptr. 621]: 'The protection afforded is against unlawful discrimination which uses law enforcement as its vehicle'. As such, *the doctrine imposes absolutely no impediment to legitimate law enforcement operations,* for *it does not insulate particular lawbreakers from prosecution,* but *simply requires that the authorities enforce the laws even-handedly.*" (Emphasis added; *Murgia,* supra.)

We note the testimony of Conti indicated that department Director Rice informed him the department permitted the same theatrical presentation for two weeks at a licensed premises in Los Angeles, apparently because it only had two more weeks to run (R.T. III, 150); however, Rice apparently was not the department Director when the Los Angeles performance occurred (R.T. I, 10). Moreover, the testimony also indicates Department Investigator Gin did not know about the performance in Los Angeles when he ordered the Rule 143.3 investigation of appellant (R.T. II, 63-64); that Gin never received instructions not to actively investigate and enforce Rule 143.3 as to any licensed premises within his jurisdiction (R.T. II, 78); that the instructions Gin received vis-a-vis the subject premises were the same that he received from his superior as to any other

violation, with no emphasis attached (R.T. II, 80-81); that Gin made checks on clubs in the North Beach area during the same month he visited the subject premises and found no Rule 143.3 violations therein (R.T. II, 82); and, that some of Gin's investigators had also checked that area (R.T. II, 18). Finally, inequities in the application of the law alone are not a denial of equal protection; the law does not demand that enforcement be perfect (*Gutknecht* v. *City of Sausalito,* 43 Cal.App.3d 269, 281).

Appellant's contention there were not adequate department findings regarding discriminatory design and enforcement of the rule herein, is devoid of merit. Determination of Issues No. II in the department's decision herein, states:

> "The department is not, and was not, estopped from the filing of the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent."

And, the department findings in support of this determination indicate the chronology of the events in detail, including the discussion by appellant's major stockholder, Mr. Conti, with Director Rice over the telephone (Department's Finding No. II). No error has been committed (See *Reimel* v. *ABC Appeals Board and Piccirilli,* 250 Cal.App. 2d 779 [58 Cal.Rptr. 788].) Moreover, findings of administrative agencies are to be liberally construed to support rather than defeat the order made (*Meyers* v. *ABC Appeals Board,* 238 Cal.App.2d 869 [48 Cal.Rptr. 259]). Finally, the California Constitution, Article VI, section 13 states where pertinent:

> "No judgment shall be set aside, . . . in any cause, for any error as to any matter of procedure, unless, after an examination of the entire cause, . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The evidence supports the findings and the findings support the department's decision. Accordingly, the department's decision is affirmed

PETER M. FINNEGAN,
CHAIRMAN

ALCOHOLIC BEVERAGE
CONTROL APPEALS
BOARD

Member concurring:
Jacob F. West

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
Against:

Tran-Con Corporation
dba The Palladium
1031 Kearny Street
San Francisco, CA 94133

On-sale general license

Under the Alcoholic Beverage Control Act.

AB-4743
File No. 37664; Reg. 9728

ALJ: Robert S. Kendall (w:c)

Date and Place of Hearing:
January 3, 1980
350 McAllister Street
San Francisco, CA

For Department:
Honorable George Deukmejian
Attorney General
Gordon Zane
Deputy Attorney General

For Appellant:
Jeff Zimmerman, Attorney

Tran-Con Corporation, doing business as The Palladium, has appealed a decision of the Department of Alcoholic

Beverage Control, issued under the provisions of Government Code section 11517(c), which determined:

"I. By reason of the foregoing facts, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code.

"Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that respondent has violated, or permitted the violation of, Title 4, California Administrative Code, Rule 143.3 and 143.3(1)(c).

"II. The Department is not, and was not, estopped from the filing of the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent.

"III. The motion of the Department of Alcoholic Beverage Control to quash service of process requiring the attendance at the hearing and the testimony of Baxter Rice, Director, Department of Alcoholic Beverage Control, previously granted, is hereby confirmed."

The department's decision revoked said license, said revocation was stayed upon condition for three years with 45 days actual suspension to run concurrently with AB-4742.

The decision further provides:

"FINDINGS OF FACT:

"I

"On March 21, 1978, during the performance of a musical stage production entitled "Let My People Come," (LMPC), RICHARD ATCHISON, TERRY COWICK, ANN DEBLINGER, MARCOS ESTEBEZ, JOAN FROSCH, MIKE GRIFF, DUDLEY JONES, AUDRI KAIREN and APRIL MONSON did display their pubic hair and did expose their genitals to the audience in the premises.

"II

"a) It was established that on December 13, 1977, representatives of the Northern California Division, Department of Alcoholic Beverage Control (DABC), including Department counsel and the San Francisco District Administrator, previewed a performance of LMPC at the licensed premises. At that time, the Corporate President and major stockholder of the licensee, Samuel J. Conti (Conti), was advised by these officials it was their consensus the display of genitalia and pubic hair observed during the performance would result in accusations being filed against the license for violation of Title IV, California Administrative Code, Rule 143.3 (Rule), if the displays were continued during future performances of LMPC at the premises.

"b) It was established that on dates not ascertained, but around the time of the preview above referred to and thereafter on subsequent contacts with various Northern Division and San Francisco District DABC employees, Conti informed them the exact identical production of LMPC had been permitted to be performed in a DABC licensed

premises in Los Angeles; namely, the "Whiskey-A-Go-Go" for several months during 1975-1976.

"Conti also told the Northern California DABC officials that Southern California DABC officials had also previewed the "Whiskey-A-Go-Go" LMPC presentation, and had not thereafter filed accusations during its run, or put that licensee on notice of probable violations of the Rule, then or thereafter."

"c) It was established that on a date not ascertained, but after the events related in (a) and (b) above, Conti contacted the Director of the Department of Alcoholic Beverage Control in Sacramento by phone to express his dismay and anger at what he considered discriminatory enforcement, as well as unequal application, of the rule in Northern California contrasted to Southern California, by Northern California Department of Alcoholic Beverage Control authorities.

"Conti testified Director Rice subsequently called him to advise of the results of his investigation of Conti's allegations that Southern California Department of Alcoholic Beverage Control had a least tacitly approved the showing of "Let My People Come", despite purported Rule 143.3 violations. According to Conti, Rice told him the Southern California Department officials advised they had learned of the "Whiskey-A-Go-Go" "Let My People Come" production only three days before it was scheduled to close. Therefore, the Department had permitted the purported rule violations to continue in view of its imminent closing. No rebuttal testimony or evidence concerning this portion of Conti's testimony was received.

"It is found that "Whiskey-A-Go-Go" was, in fact, a Department licensed premises when "Let My People Come" played there, and that violations of Rule 143.3 involving display of genitalia and pubic hair occurred during that production.

"It was not established that Rice or any other Department official tacitly, expressly, or in any other manner, thereby approved any violations of Rule 143.3 by Conti during the run of "Let My People Come" in San Francisco."

"d) It is found that before service of any of the accusations here in issue, a DABC representative personally delivered a copy of the Rule to Conti. On each occasion when DABC personnel came to the premises to observe performances of LMPC, they made their presence and purpose known to Conti or to other corporation employees.

It was established that service of each accusation arising out of observations of the DABC personnel of violations of the Rule on these visits, was timely and properly made on Conti before additional observations were made or accusations registered.

"e) It is found throughout the sequence of events set out above, it was Conti's good faith conviction and belief that:

"1. The Rule was overbroad and was not applicable to the presentation of LMPC in the licensed premises because it (the Rule) did not contemplate, or take into account, theatrical nonsexual use of nudity in bona fide, legitimate theatrical productions. For example, in grand opera presentations of Salome, or African Native folk dance performances presented at the San Francisco Opera House

where licensed service of alcoholic beverages is permitted, in the past had shown frontal nudity;

"2. The Department of Alcoholic Beverage Control was discriminatorily enforcing Rule 143.3 against his corporate license because he had personally observed in other licensed premises in the North Beach area where the Palladium is located, what, in his opinion, were widespread, frequent, continuing, flagrant and aggravated abuse of the Rule against displays of genitalia and pubic hair;

"Conti also concluded, because of his general personal knowledge of North Beach area activity, that these other licensees were not being investigated by the DABC; nor were accusations being registered against them for Rule violations; whereas, he was being investigated;

"3. The Department had established two criteria for enforcement of the Rule: one for Southern California Licensees, and another for Northern California licensees."

"(f) Based upon the above, Conti willfully permitted the presentation of "Let My People Come" to violate the rules of the Department of Alcoholic Beverage Control."

"III

"a) It was established LMPC is a bona fide, legitimate theatrical production engaging professional actors, singers and dancers, and was presented in the premises with a live band except for the last few weeks. LMPC had a libretto score, printed illustrated program, a producer, a director, and as well a full staff of technicians such as is usually and customarily employed in musical stage productions.

"b) Identical productions LMPC had been shown for an unascertained period in a New York theater prior to opening in the "Whiskey-A-Go-Go," in Los Angeles in late November, 1975 where it closed in late March, 1976.

"c) LMPC opened an identical production, except for a new cast, at the Palladium in San Francisco in December, 1977. It closed at approximately the end of August, 1978.

"d) LMPC consists of a series of tableaux, or acts of singing, or dancing, recitation, or combinations of these activities performed by cast members solo as well as up to the full company. During these sequences, as many as all or few as one of the actors, both male and/or female, in course and as part of a particular act, would appear either fully or partially nude. While most actors in the cast appeared nude at times during the performance, several appeared clothed in all sequences.

"At the times when nudity occurred the genitalia and pubic hair of the nude male actors were clearly and fully exposed. No female genitalia was observed at any performance; however, the pubic hair of the females was clearly exposed."

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"f) It is true that both explicit, and suggestive language and subjects dealing with sexual activity are used in dialogue and song lyrics; such as fellatio, cunnilingus, ejaculation, etc., both in "street" and "proper" vernacular."

"IV

"a) Respondent Corporation, during this period, operated the Palladium as a dinner-theater restaurant,

using a cabaret format. There was no sit-down bar, or bar area, for the serving of alcoholic beverages to the public. Rather, all patrons were seated at tables and served alcoholic beverages by waitresses who obtained mixed drinks from a small service bar window.

"A menu of full course dinners, primarily Italian in style, was available to patrons of the premises.

"Respondent Corporation invested a large sum of money in alterations and refurnishing of the premises to establish the theater format.

"b) Since opening, and prior to the booking of LMPC, respondent had presented three other stage productions which ran for varying periods. Two of these productions were: "Dressing Room," with comedian Jackie Vernon; and "Godspell," which is still touring the U.S. with a road company. Both of these productions are classifiable as legitimate theater productions.

"The premises since August, 1978 has been converted into and is operating as a discotheque but is capable to conversion back to a theater format."

"LICENSEE PREVIOUS RECORD:

"Licensed as above since July 21, 1977 with no record of any disciplinary action. Accusation filed 12-22-77, Reg. # 9081, Violation of Rule 143.3 and 143.3(1)(c), pending. Accusation filed 1-11-78; Reg. # 9159, Violation of Rule 143.3 and 143.3(1)(c), pending. Accusation filed Feb. 7, 1978, Reg. 9325, Violation Rule 143.3 and 143.3(1)(c), pending."

Appellant appeals upon the basis of Business and Professions Code section 23084.

In its opening brief, appellant indicates it does not contest the department's findings that nudity was exhibited in the licensed premises by males and females on stage and that alcoholic beverages were being served during said performances (Opening Brief of licensee, page 2 and page 1 of incorporated argument).

Upon appeal appellant contends: the factual findings of the department's decision are incomplete as to the issue of discriminatory design and enforcement of Rule 143; enforcement of the accusation violates the guaranteed equal protection of the laws, in that an identical performance was unhindered by the department during its showing in Los Angeles, which the department was well aware of, but failed to file accusations against, as well as other rule violators in San Francisco, and that there was evidence showing a clear motive of harassment on the part of the department regarding the license owners' association activities (citing *Murgia* v. *Municipal Court*, 15 Cal.3d 286; *People* v. *Superior Court* (*Hartway*), 19 Cal. 3d 338, *Craig* v. *Boren*, 429 U.S. 190 [50 L.Ed. 2d 397]; and, *Yick Wo* v. *Hopkins*, 118 U.S. 356 [30 L.Ed. 220]); the underlying regulations are unconstitutionally vague, in that California Administrative Code, Title 4, section 143.3, does not clearly proscribe the illegal conduct and give fair notice (citing *Papachristou* v. *Jacksonville*, 405 U.S. 156 [31 L.Ed. 2d 110]; *NAACP* v. *Button*, 371 U.S. 415 [9 L.Ed. 2d 405]; *Baggett* v. *Bullitt*, 377 U.S. 360 [12 L.Ed. 2d 377]; and, *Winters* v. *New York*, 333 U.S. 507 [92 L.Ed.

840]); the subject regulatory scheme is void for overbreadth, violating the First Amendment, in that department Rule 143.3 punishes constitutionally protected conduct as well as acts which may be validly prohibited (discussing *Baggett* v. *Bullitt*, supra; *NAACP* v. *Sutton*, supra; *LaRue* v. *California*, 409 U.S. 109 [34 L.Ed. 2d 342]; *Boreta* v. *Department of Alcoholic Beverage Control*, 2 Cal.3d 85; *Locker* v. *Kirby*, 31 Cal.App.3d 520; *Eice* v. *ABC Appeals Board*, 21 Cal.3d. 431; *Marsh* v. *Alabama*, 326 U.S. 501 [90 L.Ed. 265]; *Crownover* v. *Musick*, 9 Cal. 3d 405; *Craig* v. *Boren*, 429 U.S. 190 [50 L.Ed. 2d 397]; *Virginia State Board* v. *Virginia, etc., Council*, 425 U.S. 748 [48 L.Ed. 2d 346]; *Bates* v. *State Bar*, 433 U.S. 350 [53 L.Ed. 2d 810]; *Welton* v. *Los Angeles*, 18 Cal.3d 497; *Linmark Associates* v. *Willingboro*, 43 U.S. 85 [52 L.Ed. 2d 155]; *Sail'er Inn* v. *Kirby*, 5 Cal.3d 1; *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 [45 L.Ed. 2d 648]; *Younger* v. *Harris*, 401 U.S. 37 [27 L.Ed. 2d 669]; and, *United States* v. *O'Brien*, 391 U.S. 367 [20 L.Ed. 2d 672]).

Appellant's contention that California Administrative Code, Title 4, section 143.3,[1] is unconstitutionally void for vagueness is without merit.

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[1]Section 143.3 states:

"Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No Licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality.

The section of Rule 143.3 which the department's finding indicates the licensee was found to have violated herein (Finding I: A, B, C and D), reads in precise language, and does not allow a licensee to permit the displaying of "pubic hair", "anus" or "genitals" in his licensed premises. In view of the admission in appellant's brief that the subject male and female performers were nude, there is no real issue herein concerning preciseness, hence, any issue with regard to what would constitute exposure on this record is not relevant. Moreover, in regard to the specific aspects of the rule which were violated, it is clear the rule is quite precise. Either the above aspects of the human anatomy are displayed or they are not displayed.

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oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable."

Appellant's contention an unrelated subsection of 143.3, subsection (b), is void as it does not define "touching", is based on a speculative enforcement pattern suggested in arguments but not shown in the department's decision as to the violations found, which does not mention any "touching". Speculation as to the possible unreasonable administration or enforcement of a statute or regulation is not a sufficient ground for holding it unconstitutional (in re *Monks Estate*, 48 Cal.App.2d 603; *People* v. *Hicks*, 222 Cal.App.2d 265). Moreover, it is a well settled rule of law that a party must show that his rights are injuriously affected by the law before he can raise a constitutional question with regard thereto (in re *Doran*, 6 Cal. App.2d 69, 70 [44P2d 367]; in re *Creglar*, 56 Cal.2d 308, 313 [363 P.2d 305]). The courts are also not required to consider every conceivable situation thereunder (*Bowland* v. *Municipal Court*, 18 C3d 479).

Appellant's contention the subject regulation at issue herein is overbroad is likewise without merit. There is no legal authority which holds the proscribed conduct must result in "'raucous or disruptive" behavior, as claimed by appellant, in order to be enforced by the department.

The provisions of the rule herein applied were upheld in *California* v. *LaRue*, 409 U.S. 109 [93 S.Ct. 390], wherein it was held that Rule 143.3, which prohibits the sale of liquor by the drink in premises where there were nude, but not necessarily obscene performances, is constitutional. In *LaRue* it was stated:

> "But we do not believe the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our deci-

> sions as to obscenity, *or in accordance with the limits proscribed for dealing with some forms of communicative conduct in O'Brien.*" (Emphasis added; 409 U.S. 116.)

The *LaRue* decision held the regulatory scheme herein to be constitutional. It was not found to be overbroad or a violation of the First Amendment. Moreover, the subject rule has been applied many times by the department and its has never been indicated by the courts that destructive or disruptive behavior would be necessary to show a violation thereof (*California* v. *LaRue*, supra, 409 U.S. 109; *Doran* v. *Salem Inn, Inc.*, 95 S.Ct. 2561; *Kirby* v. *ABC Appeals Board and 552 Broadway, Inc., et al.*, 47 Cal.App. 3d 360). The pertinent rule in question is not content, but conduct, related; in *Crownover* v. *Musick*, 9 Cal.3d 405, the Supreme Court indicated municipal ordinances proscribing the state of dress in public places were constitutional and not a violation of the First Amendment; the department rule does not go so far; it only applies to the exposure of one's private parts in on-sale licensed premises.

Appellant's further contention that a statute or regulatory scheme which is vague or overbroad will always be struck down by the courts is not correct. The California Supreme Court in *Pryor* v. *Municipal Court*, 25 Cal.3d 238, recently stated, in September of 1979, that "the judiciary bears an obligation to 'construe enactments to give specific content to terms that might otherwise be unconstitutionally vague.' (citations omitted.)"

Moreover, *California* v. *LaRue*, supra, supports this department decision because the acts found in violation

were performed in a licensed premises; and, the rule applied to appellant concerns the exposure of genitals and pubic hair; it has nothing to do with songs or other communicative content. The evidence indicates the department informed the licensee it could surrender the license during the performances or cover up the entertainers' pubic hair and genitalia.

The testimony in this record describing the performances does not indicate how covering the pubic hair and genitals of the participants would thwart communication. Clearly this is a rule which reasonably regulates the time, place, and manner of certain performances, as specifically permitted in *Welton* v. *City of Los Angeles*, 18 Cal.3d 497, cited by appellant. Moreover, the subject rule does permit the exposure of breasts and buttocks, which was not the case in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 45 L.Ed. 2d 648, discussed by appellant; *Doran* permits the banning of nudity in alcoholic beverage licensed premises. Herein we are concerned with the right to sell alcohol by the drink and the consumption by the public thereof in the same room where the live performance is being presented; accordingly, under a reasonable interpretation of the cited cases, the department rule is reasonable, precise and constitutional.

Appellant's contentions the department denied it equal protection of the laws by enforcing the accusation and that the accusation resulted in discriminatory enforcement with regard to appellant are devoid of merit.

In *People* v. *Superior Court (Hartway)*, 19 Cal.3d 338, cited by the appellant, the court pointed out that because

of the presumption that an official duty has been properly, hence constitutionally, performed (citing Evidence Code section 664), a defendant has the burden of proof in establishing the defense of discriminatory enforcement of the law (citing *Murgia* v. *Municipal Court*, 15 Cal.3d 286 at 305; *People* v. *Sperl*, 54 Cal.App.3d 640, 657 [126 Cal.Rptr. 907]; *People* v. *Gray*, 254 Cal.App.2d 256, 265 [63 Cal.Rptr. 211]); that the sine qua non of said defense is the deliberate singling out of the defendant for prosecution on the basis of some invidious criterion; that the prosecution would not have been pursued but for its discriminatory design.

In the instant case, the evidence does not indicate that Mr. Conti, the principle shareholder of the appellant, was singled out for discriminatory treatment. Conti's allegation of discrimination due to alleged purposeful delays in some of his five license applications and transfers is not supported by substantial evidence in the record. His testimony indicates the alleged delays were either caused by the police department filing protests, because of an invalid license to be transferred, or because of a criminal indictment pending against him (R.T. III, 131-142). Since the department has a duty to investigate protests and unfit applicants. no invidious criterion or discriminatory design has been proved (California Const., Art. XX, Section 22 and Business and Professions Code sec. 23958). Moreover, Conti admits in his testimony that he met the department investigators at the El Matador Restaurant and invited them to observe his show at the Palladium. The department representatives came to the performance and pointed out the violations of Rule 143.3, in that appellant was serving alcohol by the

drink in its premises while stage performers were clearly being permitted to expose their entire pubic area. This is not a case where the licensee's performers were simply wearing loose garments. Indeed, appellant admits it permitted performers to appear in the subject premises while nude (Appellant's Opening Brief p.2; incorporated Brief p.1). The evidence introduced by appellant at the department hearing indicated, with one or two exceptions, that other alcoholic beverage licensees in San Francisco are *not* permitting their performers to perform without a garment covering their pubic area. The appellant's private investigators who testified with regard to other performances occurring some months after the performance in question, indicated that, with the exception of one instance where a pegnoir was utilized, all performers had an opaque covering over their pubic area; although some were loose. Moreover, there was no evidence that the department investigators observed the pegnoir incident or when any exposure resulted from said loose garments. Furthermore, in *Murgia* v. *Municipal Court,* 15 Cal.3d 286, supra, the court stated at 296:

> "Contrary to the People's suggestion, the allegedly 'unequal' treatment which may result from simple *laxity of enforcement or the non-arbitrary selective enforcement* of a statute has never been considered a denial of equal protection."

The court also stated that:

> "As these authorities teach, *an equal protection violation does not arise whenever officials 'prosecute one and not [another] for the same act'* (cf. *People* v. *Montgomery, supra,* 47 Cal.App.2d 1, 13); instead, the equal

protection guarantee simply prohibits prosecuting officials from *purposefully and intentionally singling out* individuals for *disparate treatment on an invidiously discriminatory basis.* As the Court of Appeal succinctly stated in *City of Banning* v. *Desert Outdoor Advertising, Inc.* (1962) 209 Cal.App.2d 152, 156 [25 Cal. Rptr. 621]: 'The protection afforded is against unlawful discrimination which uses law enforcement as its vehicle'. As such, *the doctrine imposes absolutely no impediment to legitimate law enforcement operations,* for *it does not insulate particular lawbreakers from prosecution,* but *simply requires that the authorities enforce the laws evenhandedly.*" (Emphasis added; *Murgia,* supra.)

We note the testimony of Conti indicated that department Director Rice informed him the department permitted the same theatrical presentation for two weeks at a licensed premises in Los Angeles, apparently because it only had two more weeks to run (R.T. III, 150); however, Rice apparently was not the department Director when the Los Angeles performance occurred (R.T. I, 10). Moreover, the testimony also indicates Department Investigator Gin did not know about the performance in Los Angeles when he ordered the Rule 143.3 investigation of appellant (R.T. II, 63-64); that Gin never received instructions not to actively investigate and enforce Rule 143.3 as to any licensed premises within his jurisdiction (R.T. II, 78); that the instructions Gin received vis-a-vis the subject premises were the same that he received from his superior as to any other violation, with no emphasis attached (R.T. II, 80-81); that Gin made checks on clubs in the North Beach area during

the same month he visited the subject premises and found no Rule 143.3 violations therein (R.T. II, 82); and, that some of Gin's investigators had also checked that area (R.T. II, 18). Finally, inequities in the application of the law alone are not a denial of equal protection; the law does not demand that enforcement be perfect (*Gutknecht* v. *City of Sausalito,* 43 Cal.App.3d 269, 281).

Appellant's contention there were not adequate department findings regarding discriminatory design and enforcement of the rule herein, is devoid of merit. Determination of Issues No. II in the department's decision herein, states:

> "The department is not, and was not, estopped from the filing of the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent."

And, the department findings in support of this determination indicate the chronology of the events in detail, including the discussion by appellant's major stockholder, Mr. Conti, with Director Rice over the telephone (Department's Finding No. II). No error has been committed. (See *Reimel* v. *ABC Appeals Board and Piccirilli,* 250 Cal.App.2d 779 [58 Cal.Rptr. 788]. Moreover, findings of administrative agencies are to be liberally construed to support rather than defeat the order made (*Meyers* v. *ABC Appeals Board,* 238 Cal.App.2d 869 [48 Cal.Rptr. 259]). Finally, the California Constitution, Article VI, section 13 states where pertinent:

> "No judgment shall be set aside, . . . in any cause, for any error as to any matter of procedure, unless, after an examination of the entire cause, . . . the court shall

be of the opinion that the error complained of has resulted in a miscarriage of justice."

With regard to the penalty, it is noted this matter pertains to a third accusation before this board filed against the licensee for violations of Department Rule 143.3, relative to a performance entitled "Let My People Come", occurring at the licensed premises. The department ordered the license revoked, with said revocation being stayed for three years, on condition that no subsequent violation occur within said period of time, and also imposed a 45 day suspension. The department further ordered that this penalty run concurrently with that imposed in its decision concerning the second accusation (AB-4742; File No. 37664; Reg. 9325). Although having been informed by the department that the performance involved was in violation of the department rule, and he had been previously served with two accusations, the licensee's representative, nevertheless, deliberately continued to violate the rule. Under the circumstances, we concur with the penalty imposed herein. (*Dave's Market, Inc.* v. *Department of Alcoholic Beverage Control*, 222 Cal.App.2d 671, 680; 35 Cal.Rptr. 348.)

The evidence supports the findings and the findings support the department's decision, which is affirmed.

PETER M. FINNEGAN, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Member Concurring:
Jacob F. West

Before the Alcoholic Beverage Control Appeals Board
of the State of California

AB-4742
File 37664; Reg. 9325

ALJ: Robert S. Kendall (w:s)

Date and Place of Hearing:
January 3, 1980
350 McAllister Street
San Francisco, CA

For Department:
George Deukmejian, Attorney Gen.
Gordon Zane, Deputy Attorney Gen.

For Appel: Jeff Zimmerman, Atty.

[Filed April 30, 1980]

In the Matter of the Accusation
Against:

Tran-Con Corporation
dba The Palladium
1031 Kearny Street
San Francisco, CA 94133

On-sale general license

Under the Alcoholic Beverage Control Act.

Tran-Con Corporation, doing business as The Palladium, has appealed a decision of the Department of Alcoholic Beverage Control, issued under the provisions of Government Code section 11517(c), which determined:

"I. By reason of the foregoing facts, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code.

"Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that respondent has violated, or permitted the violation of Title 4, California Administrative Code, Rule 143.3 and 143.3(1)(c).

"II. The Department is not, and was not, estopped from the filing of the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent.

"III. The motion of the Department of Alcoholic Beverage Control to quash service of process requiring the attendance at the hearing and the testimony of Baxter Rice, Director, Department of Alcoholic Beverage Control, previously granted, is hereby confirmed.

The department's decision revoked said license, but said revocation was stayed upon condition for three years, with a 45 day suspension to run concurrently with AB-4743.

The decision further provides:

"FINDINGS OF FACT:

"I

"A. On January 17, 1978, during a performance of a musical stage production entitled "Let My People Come,"

(LMPC), Auristela Frias, Nancy Froelich, Empress Kilpatrick, Christine Rubens and Claudia Talbot did display their pubic hair to the audience in the premises.

"B. On January 17, 1978, during the performance of a musical stage production entitled "Let My People Come," Ray Colbert, Bob Jockers, Joe Jones, John Ponyman and John-David Yarbrough did display their pubic hair and did expose their genitals to the audience in the premises.

"C. On January 20, 1978, during a performance of a musical stage production entitled "Let My People Come," Auristela Frias, Nancy Froelich, Empress Kilpatrick, Christine Rubens and Claudia Talbot did display their pubic hair to the audience in the premises.

"D. On January 20, 1978, during the performance of a musical stage production entitled "Let My People Come," Ray Colbert, Bob Jockers, Joe Jones, John Ponyman and John-David Yarbrough did display their pubic hair and did expose their genitals to the audience in the premises.

"II

"a) It was established that on December 13, 1977, representatives of the Northern California Division, Department of Alcoholic Beverage Control (DABC), including Department counsel and the San Francisco District Administrator, previewed a performance of LMPC at the licensed premises. At that time, the Corporate President and major stockholder of the licensee, Samuel J. Conti (Conti), was advised by these officials it was their consensus the display of genitalia and pubic hair observed during the performance would result in accusations being filed against the license for violation of Title IV, California Administrative

Code, Rule 143.3 (Rule), if the displays were continued during future performances of LMPC at the premises.

"b) It was established that on dates not ascertained, but around the time of the preview above referred to and thereafter on subsequent contacts with various Northern Division and San Francisco District DABC employees, Conti informed them the exact, identical production of LMPC had been permitted to be performed in a DABC licensed premises in Los Angeles; namely, the "Whiskey-A-Go-Go" for several months during 1975-76.

"Conti also told the Northern California DABC officials that Southern California DABC officials had also previewed the "Whiskey-A-Go-Go" LMPC presentation, and had not thereafter filed accusations during its run, or put that licensee on notice of probable violations of the Rule, then or thereafter.

"c) It was established that on a date not ascertained, but after the events related in (a) and (b) above, Conti contacted the Director of the Department of Alcoholic Beverage Control in Sacramento by phone to express his dismay and anger at what he considered discriminatory enforcement, as well as unequal application, of the rule in Northern California contrasted to Southern California, by Northern California Department of Alcoholic Beverage Control authorities.

"Conti testified Director Rice subsequently called him to advise of the results of his investigation of Conti's allegations that Southern California Department of Alcoholic Beverage Control had at least tacitly approved the showing of "Let My People Come," despite purported Rule

143.3 violations. According to Conti, Rice told him the Southern California Department officials advised they had learned of the "Whiskey-A-Go-Go" "Let My People Come" production only three days before it was scheduled to close. Therefore, the Department had permitted the purported rule violations to continue in view of its imminent closing. No rebuttal testimony or evidence concerning this portion of Conti's testimony was received.

"It is found that "Whiskey-A-Go-Go" was, in fact, a Department licensed premises when "Let My People Come" played there, and that violations of Rule 143.3 involving display of genitalia and pubic hair occurred during that production.

"It was not established that Rice or any other Department official tacitly, expressly, or in any other manner, thereby approved any violations of Rule 143.3 by Conti during the run of "Let My People Come" in San Francisco.

"d) It is found that before service of any of the accusations here in issue, a DABC representative personally delivered a copy of the Rule to Conti. On each occasion when DABC personnel came to the premises to observe performances of LMPC, they made their presence and purposes known to Conti or to other corporation employees.

"It was established that service of each accusation arising out of observations of the DABC personnel of violations of the Rule on these visits, was timely and properly made on Conti before additional observations were made or accusations registered.

"e) It is found throughout the sequence of events set out above, it was Conti's good faith conviction and belief that:

"1. The Rule was overbroad and was not applicable to the presentation of LMPC in the licensed premises because it (the Rule) did not contemplate, or take into account, theatrical nonsexual use of nudity in bona fide, legitimate theatrical productions. For example, in grand opera presentations of Salome, or African Native folk dance performances presented at the San Francisco Opera House where licensed service of alcoholic beverages is permitted, in the past had shown frontal nudity;

"2. The Department of Alcoholic Beverage Control was discriminatorily enforcing Rule 143.3 against his corporate license because he had personally observed in other licensed premises in the North Beach area where the Palladium is located, what, in his opinion, were widespread, frequent, continuing, flagrant and aggravated abuse of the Rule against displays of genitalia and pubic hair;

"Conti also concluded, because of his general, personal knowledge of North Beach area activity, that these other licensees were not being investigated by the DABC; nor were accusations being registered against them for Rule violations; whereas, he was being investigated;

"3. The Department had established two criteria for enforcement of the Rule: one for Southern California Licensees, and another for Northern California licensees.

"f) Based upon the above, Conti wilfully permitted the presentation of "Let My People Come" to violate the rules of the Department of Alcoholic Beverage Control.

"III

"a) It was established LMPC is a bona fide, legitimate theatrical production engaging professional actors, singers and dancers, and was presented in the premises with a live band except for the last few weeks. LMPC had a libretto, score, printed illustrated program, a producer, a director, and as well a full staff of technicians such as is usually and customarily employed in musical stage productions.

"b) Identical productions LMPC had been shown for an unascertained period in New York theater prior to opening in the "Whiskey-A-Go-Go," in Los Angeles in late November, 1975 where it closed in late March, 1976.

"c) LMPC opened an identical production, except for a new cast, at the Palladium in San Francisco in December, 1977. It closed at approximately the end of August, 1978.

"d) LMPC consists of a series of tableaux, or acts of singing, or dancing, recitation, or combinations of these activities performed by cast members solo as well as up to the full company. During these sequences, as many as all or few as one of the actors, both male and/or female, in course and as part of a particular act would appear either fully or partially nude. While most actors in the cast appeared nude at times during the performance, several appeared clothed in all sequences.

"At the times when nudity occurred the genitalia and pubic hair of the nude male actors were clearly and fully

exposed. No female genitalia was observed at any performance; however, the pubic hair of the females was clearly exposed.

"f) It is true that both explicit, and suggestive language and subjects dealing with sexual activity are used in dialogue and song lyrics; such as fellatio, cunnilingus, ejaculation, etc., both in "street" and "proper" vernacular.

"IV

"a) Respondent Corporation, during this period, operated the Palladium as a dinner-theater restaurant, using a cabaret format. There was no sit-down bar, or bar area, for the serving of alcoholic beverages to the public. Rather, all patrons were seated at tables and served alcoholic beverages by waitresses who obtained mixed drinks from a small service bar window.

"A menu of full course dinners, primarily Italian in style, was available to patrons of the premises.

"Respondent Corporation invested a large sum of money in alterations and refurnishings of the premises to establish the theater format.

"b) Since opening, and prior to the booking of LMPC, respondent had presented three other stage productions which ran for varying periods. Two of these productions were: "Dressing Room," with comedian Jackie Vernon; and "Godspell," which is still touring the U.S. with a road company. Both of these productions are classifiable as legitimate theater productions.

"The premises since August 1978 has been converted into and is operating as a discotheque but is capable to conversion back to a theater format.

"LICENSEE PREVIOUS RECORD:

Licensed as above since July 21, 1977 with no record of any disciplinary action. Accusation filed 12-22-77, Reg. #9081, Violation Rule 143.3 and 143.3 (1) (c), pending. Accusation filed 1-11-78, Reg. #9159, Violation of Rule 143.3 and 143.3 (1) (c), pending."

Appellant appeals upon the basis of Business and Professional Code section 23084.

In its opening brief, appellant indicates it does not contest the department's findings that nudity was exhibited in the licensed premises by males and females on stage and that alcoholic beverages were being served during said performances (Opening Brief of licensee, page 2 and page 1 of incorporated argument).

Upon appeal appellant contends: the factual findings of the department's decision are incomplete as to the issue of discriminatory design and enforcement of Rule 143; enforcement of the accusation violates the guaranteed equal protection of the laws, in that an identical performance was unhindered by the department during its showing in Los Angeles, which the department was well aware of, but failed to file accusations against, as well as other rule violators in San Francisco, and that there was evidence showing a clear motive of harassment on the part of the department regarding the license owners' associational activities (citing *Murgia* v. *Municipal Court*, 15 Cal.3d 286;

People v. *Superior Court (Hartway)*, 19 Cal.3d 338, *Craig* v. *Boren*, 429 U.S. 190 [50 L.Ed. 2d 397]; and, *Yick Wo* v. *Hopkins*, 118 U.S. 356 [30 L.Ed. 220]; the underlying regulations are unconstitutionally vague, in that California Administrative Code, Title 4, section 143.3, does not clearly proscribe the illegal conduct and give fair notice (citing *Papachristou* v. *Jacksonville*, 405 U.S. 156 [31 L.Ed. 2d 110]; *NAACP* v. *Button*, 371 U.S. 415 [9 L.Ed. 2d 405]; *Baggett* v. *Bullitt*, 377 U.S. 360 [12 L.Ed. 2d 377]; and, *Winters* v. *New York*, 333 U.S. 507 [92 L.Ed. 840]); the subject regulatory scheme is void for overbreadth, violating the First Amendment, in that department Rule 143.3 punishes constitutionally protected conduct as well as acts which may be validly prohibited (discussing *Baggett* v. *Bullitt*, supra; *NAACP* v. *Button*, supra; *LaRue* v. *California*, 409 U.S. 109 [34 L.Ed. 2d 342]; *Boreta* v. *Department of Alcoholic Beverage Control*, 2 Cal.3d 85; *Locker* v. *Kirby*, 31 Cal.App.3d 520; *Rice* v. *ABC Appeals Board*, 21 Cal.3d 431; *Marsh* v. *Alabama*, 326 U.S. 501 [90 L.Ed. 265]; *Crownover* v. *Musick*, 9 Cal.3d 405; *Craig* v. *Boren*, 429 U.S. 190 [50 L.Ed. 2d 397]; *Virginia State Board* v. *Virginia, etc., Council*, 425 U.S. 748 [48 L.Ed. 2d 346]; *Bates* v. *State Bar*, 433 U.S. 350 [53 L.Ed. 2d 810]; *Welton* v. *Los Angeles*, 18 Cal.3d 497; *Linmark Associates* v. *Willingboro*, 43 U.S. 85 [52 L.Ed. 2d 155]; *Sail'er Inn* v. *Kirby*, 5 Cal. 3d 1; *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 [45 L.Ed. 2d 648]; *Younger* v. *Harris*, 401 U.S. 37 [27 L.Ed. 2d 669]; and, *United States* v. *O'Brien*, 391 U.S. 367 [20 L.Ed. 2d 672]).

Appellant's contention that California Administrative Code, Title 4, section 143.3,[1] is unconstitutionally void for vagueness is without merit.

The section of Rule 143.3 which the department's finding indicates the licensee was found to have violated herein (Finding I: A, B, C and D), reads in precise language, and

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[1]Section 143.3 states:

"Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No Licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable."

does not allow a licensee to permit the displaying of "pubic hair", "anus" or "genitals" in his licensed premises. In view of the admission in appellant's brief that the subject male and female performers were nude, there is no real issue herein concerning preciseness, hence, any issue with regard to what would constitute exposure on this record is not relevant. Moreover, in regard to the specific aspects of the rule which were violated, it is clear the rule is quite precise. Either the above aspects of the human anatomy are displayed or they are not displayed.

Appellant's contention an unrelated subsection of 143.3, subsection (b), is void as it does not define "touching", is based on a speculative enforcement pattern suggested in arguments but not shown the department's decision as to the violations found, which does not mention any "touching". Speculation as to the possible unreasonable administration or enforcement of a statute or regulation is not a sufficient ground for holding it unconstitutional (in re *Monks Estate*, 48 Cal.App.2d 603; *People* v. *Hicks*, 222 Cal. App.2d 265). Moreover, it is a well settled rule of law that a party must show that his rights are injuriously affected by the law before he can raise a constitutional question with regard thereto (in re *Doran*, 6 Cal.App.2d 69, 70 [44 P2d 367]; in re *Creglar*, 56 Cal.2d 308, 313 [363 P.2d 305]). The courts are also not required to consider every conceivable situation thereunder (*Bowland* v. *Municipal Court*, 18 C3d 479).

Appellant's contention the subject regulation at issue herein is overbroad is likewise without merit. There is no legal authority which holds the proscribed conduct must

result in "raucous or disruptive" behavior, as claimed by appellant, in order to be enforced by the department.

The provisions of the rule herein applied were upheld in *California* v. *LaRue*, 409 U.S. 109 [93 S.Ct. 390], wherein it was held that Rule 143.3, which prohibits the sale of liquor by the drink in premises where there were nude, but not necessarily obscene performances, is constitutional. In *LaRue* it was stated:

> "But we do not believe the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, *or in accordance with the limits proscribed for dealing with some forms of communicative conduct in O'Brien.*" (Emphasis added; 409 U.S. 116.)

The *LaRue* decision held the regulatory scheme herein to be constitutional. It was not found to be overbroad or a violation of the First Amendment. Moreover, the subject rule has been applied many times by the department and it has never been indicated by the courts that destructive or disruptive behavior would be necessary to show a violation thereof (*California* v. *LaRue*, supra, 409 U.S. 109; *Doran* v. *Salem Inn, Inc.*, 95 S.Ct. 2561; *Kirby* v. *ABC Appeals Board and 552 Broadway, Inc., et al.*, 47 Cal.App. 3d 360). The pertinent rule in question is not content, but conduct, related; in *Crownover* v. *Musick*, 9 Cal.3d 405, the Supreme Court indicated municipal ordinances proscribing the state of dress in public places were constitutional and not a violation of the First Amendment; the department rule does not go so far; it only applies to the exposure of one's private parts in on-sale licensed premises.

Appellant's further contention that a statute or regulatory scheme which is vague or overbroad will always be struck down by the courts is not correct. The California Supreme Court in *Pryor* v. *Municipal Court*, 25 Cal.3d 238, recently stated, in September of 1979 that "the judiciary bears an obligation to 'construe enactments to give specific content to terms that might otherwise be unconstitutionally vague.' (citations omitted.)"

Moreover, *California* v. *LaRue*, supra, supports this department decision because the acts found in violation were performed in a licensed premises; and, the rule applied to appellant concerns the exposure of genitals and pubic hair; it has nothing to do with songs or other communicative content. The evidence indicates the department informed the licensee it could surrender the license during the performances or cover up the entertainers' pubic hair and genitalia. Moreover, the subject rule does permit the exposure of the breasts and buttocks, which was not the case in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 45 L.Ed. 2d 648, discussed by appellant. The performance included singing and other activity which conveyed the message, and the testimony in this record describing the performances does not indicate how covering the pubic areas of the participants would thwart such communication. Clearly this is a rule reasonably regulating the time, place, and manner of certain conduct.[2] Herein, we are concerned with the right to sell alcohol by the drink, and the consumption by

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[2]As specifically permitted in *Welton v. City of Los Angeles*, 18 Cal.3d 497, cited by appellant.

the public thereof, in the same room where the live performance is being presented; accordingly, under a reasonable interpretation of the cases, the department rule is constitutional.

Appellant's contentions the department denied it equal protection of the laws by enforcing the accusation and that the accusation resulted in discriminatory enforcement with regard to appellant are devoid of merit.

In *People* v. *Superior Court (Hartway)*, 19 Cal.3d 338, cited by the appellant, the court pointed out that because of the presumption that an official duty has been properly, hence constitutionally, performed (citing Evidence Code section 664), a defendant has the burden of proof in establishing the defense of discriminatory enforcement of the law (citing *Murgia* v. *Municipal Court*, 15 Cal.3d 286 at 305; *People* v. *Sperl*, 54 Cal.App.3d 640, 657 [126 Cal. Rptr. 907]; *People* v. *Gray*, 254 Cal.App.2d 256, 265 [63 Cal.Rptr. 211]): that the sine qua non of said defense is the deliberate singling out of the defendant for prosecution on the basis of some invidious criterion; that the prosecution would not have been pursued but for its discriminatory design.

In the instant case, the evidence does not indicate that Mr. Conti, the principal shareholder of the appellant, was singled out for discriminatory treatment. Conti's allegation of discrimination due to alleged purposeful delays in some of his five license applications and transfers is not supported by substantial evidence in the record. His testimony indicates the alleged delays were either caused by the police department filing protests, because of an invalid

license to be transferred, or because of a criminal indictment pending against him (R.T. III, 131-142). Since the department has a duty to investigate protests and unfit applicants, no invidious criterion or discriminatory design has been proved (California Const., Art. XX, Section 22 and Business and Professions Code sec. 23958). Moreover, Conti admits in his testimony that he met the department investigators at the El Matador Restaurant and invited them to observe his show at the Palladium. The department representatives came to the performance and pointed out the violations of Rule 143.3, in that appellant was serving alcohol by the drink in its premises while stage performers were clearly being permitted to expose their entire pubic area. This is not a case where the licensee's performers were simply wearing loose garments. Indeed, appellant admits it permitted performers to appear in the subject premises while nude (Appellant's Opening Brief p.2; incorporated Brief p.1). The evidence introduced by appellant at the department hearing indicated, with one or two exceptions, that other alcoholic beverage licensees in San Francisco are *not* permitting their performers to perform without a garment covering their pubic area. The appellant's private investigators who testified with regard to other performances occurring some months after the performance in question, indicated that, with the exception of one instance where a pegnoir was utilized, all performers had an opaque covering over their pubic area; although some were loose. Moreover, there was no evidence that the department investigators observed the pegnoir incident or when any exposure resulted from said

loose garments. Furthermore, in *Murgia* v. *Municipal Court,* 15 Cal.3d 286, supra, the court stated at 296:

> "Contrary to the People's suggestion, the allegedly 'unequal' treatment which may result from simple *laxity of enforcement or the non-arbitrary selective enforcement* of a statute has never been considered a denial of equal protection."

The court also stated that:

> "As these authorities teach, *an equal protection violation does not arise whenever officials "prosecute one and not [another] for the same act'* (cf. *People* v. *Montgomery, supra,* 47 Cal.App.2d 1, 13); instead, the equal protection guarantee simply prohibits prosecuting officials from *purposefully and intentionally singling out* individuals for *disparate treatment on an invidiously discriminatory basis.* As the Court of Appeal succinctly stated in *City of Banning* v. *Desert Outdoor Advertising, Inc.* (1962) 209 Cal.App.2d 152, 156 [25 Cal. Rptr. 621]: 'The protection afforded is against unlawful discrimination which uses law enforcement as its vehicle'. As such, *the doctrine imposes absolutely no impediment to legitimate law enforcement operations,* for *it does not insulate particular lawbreakers from prosecution,* but *simply requires that the authorities enforce the laws evenhandedly.* (Emphasis added; *Murgia,* supra.)

We note the testimony of Conti indicated that department Director Rice informed him the department permitted the same theatrical presentation for two weeks at a licensed premises in Los Angeles, apparently because it only had two

more weeks to run (R.T. III, 150); however, Rice apparently was not the department Director when the Los Angeles performance occurred (R.T. I, 10). Moreover, the testimony also indicates Department Investigator Gin did not know about the performance in Los Angeles when he ordered the Rule 143.3 investigation of appellant (R.T. II, 63-64); that Gin never received instructions not to actively investigate and enforce Rule 143.3 as to any licensed premises within his jurisdiction (R.T. II, 78); that the instructions Gin received vis-a-vis the subject premises were the same that he received from his superior as to any other violation, with no emphasis attached (R.T. II, 80-81); that Gin made checks on clubs in the North Beach area during the same month he visited the subject premises and found no Rule 143.3 violations therein (R.T. II, 82); and, that some of Gin's investigators had also checked that area (R.T. II, 18). Finally, inequities in the application of the law alone are not a denial of equal protection; the law does not demand that enforcement be perfect (*Gutknecht* v. *City of Sausalito,* 43 Cal.App.3d 269, 281).

Appellant's contention there were not adequate department findings regarding discriminatory design and enforcement of the rule herein, is devoid of merit. Determination of Issues No. II in the department's decision herein, states:

> "The department is not, and was not, estopped from the filing of the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent."

And, the department findings in support of this determination indicate the chronology of the events in detail, including the discussion by appellant's major stockholder, Mr. Conti, with Director Rice over the telephone (Department's Finding No. 11). No error has been committed. (See *Reimel* v. *ABC Appeals Board and Piccirilli,* 250 Cal.App. 2d 779 [58 Cal.Rptr. 788].) Moreover, findings of administrative agencies are to be liberally construed to support rather than defeat the order made (*Meyers* v. *ABC Appeals Board,* 238 Cal.App.2d 869 [48 Cal.Rptr. 259]). Finally, the California Constitution, Article VI, section 13 states where pertinent:

> "No judgment shall be set aside, . . . in any cause, for any error as to any matter of procedure, unless, after an examination of the entire cause, . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

However, this board concludes that the department did abuse its discretion as to the penalty in this case.

The department ordered that appellant's license be revoked, with said revocation being stayed for a period of three years, on condition no subsequent violation occur within said period of time, and also imposed a 45-day suspension. This is a second accusation filed against the licensee pertaining to a performance, entitled "Let My People Come", occurring at the licensed premises on January 17, 1978 and January 20, 1978. The first accusation, relating to violations of department Rule 143.3 on December 29, 1977 and January 3, 1978, resulted in a 60-day suspension, with 30 days thereof stayed on condition that no subsequent violation occur within one year.

The imposition of revocation as to a second accusation before the board, which even though stayed encompasses a period of three years, constitutes an abuse of discretion in our opinion (cf. *Walsh* v. *Kirby,* 13 C3d 95, re excessive penalty).

The evidence supports the findings and the findings support the department's determination of the issues, which is hereby affirmed. This matter is, however, being reversed and remanded to the department for reconsideration of the penalty. As stated in the department's decision, the penalty imposed in this matter is to run *concurrently* with that of a companion case (AB-4743, File 37664, Reg. 9728).

PETER M. FINNEGAN, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Member concurring:
Hacob F. West

Before the Department of Alcoholic Beverage Control
of the State of California

File 37664
Reg. 9159

In the Matter of the Accusation Against

Tran-Con Corporation
The Paladium
1031 Kearny St.
San Francisco

on-sale general license

Respondent

under the Alcoholic Beverage Control Act.

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on August 16, 1979, for decision under Government Code Section 11517(c), and the Department having considered its entire record, including the transcript of the hearings held before Administrative Law Judge Robert S. Kendall on September 11, 13, and 14, 1978, and good cause appearing therefor, the following decision is hereby adopted:

FINDINGS OF FACT

The Findings of Fact, as to I, II(a), (b), (d), and (e), III(a), (b), (c), (d), and (f), IV(a) and (b), appearing in the Administrative Law Judge's proposed decision dated

December 26, 1978, are incorporated herein by reference as if set forth in full and are adopted as to the Findings of Fact, as to I, II(a), (b), (d), and (e), III(a), (b), (c), (d), and (f), and IV(a) and (b), for this decision.

The following additional Findings of Fact are made:

II(c). It was established that on a date not ascertained, but after the events related in (a) and (b) above, Conti contacted the Director of the Department of Alcoholic Beverage Control in Sacramento by phone to express his dismay and anger at what he considered discriminatory enforcement, as well as unequal application, of the rule in Northern California contrasted to Southern California, by Northern California Department of Alcoholic Beverage Control authorities.

Conti testified Director Rice subsequently called him to advise of the results of his investigation of Conti's allegations that Southern California Department of Alcoholic Beverage Control had at least tacitly approved the showing of "Let My People Come", despite purported Rule 143.3 violations. According to Conti, Rice told him the Southern California Department officials advised they had learned of the "Whiskey-A-Go-Go" "Let My People Come" production only three days before it was scheduled to close. Therefore, the Department had permitted the purported rule violations to continue in view of its imminent closing. No rebuttal testimony or evidence concerning this portion of Conti's testimony was received.

It is found that "Whiskey-A-Go-Go" was, in fact, a Department licensed premises when "Let My People Come" played there, and that violations of Rule 143.3 involving

display of genitalia and pubic hair occurred during that production.

It was not established that Rice or any other Department official tacitly, expressly, or in any other manner, thereby approved any violations of Rule 143.3 by Conti during the run of "Let My People Come" in San Francisco.

II(f). Based upon the above, Conti willfully permitted the presentation of "Let My People Come" to violate the rules of the Department of Alcoholic Beverage Control.

DETERMINATION OF ISSUES

I. By reason of the foregoing facts, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code.

Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that respondent has violated, or permitted the violation of Title 4, California Administrative Code, Rule 143.3 and 143.3(1)(c).

II. The Department is not, and was not, estopped from the filing of the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent.

III. The motion of the Department of Alcoholic Beverage Control to quash service of process requiring the attendance at the hearing and the testimony of Baxter

Rice, Director, Department of Alcoholic Beverage Control, previously granted, is hereby confirmed.

LICENSEE'S PREVIOUS RECORD

Licensed as above since July 21, 1977, with no record of any disciplinary action. Accusation filed December 22, 1977, Reg. 9081, violation Rule 143.3 and 143.3(1)(c), pending.

ORDER

The license of respondent, Tran-Con Corporation, is hereby suspended for sixty (60) days, with thirty (30) days thereof stayed for a period of one year upon the condition that no subsequent decision be made after hearing or upon stipulation and waiver that cause for disciplinary action occurred within one (1) year from the effective date of this decision.

Should such subsequent decision be made, the Director of Alcoholic Beverage Control may, in his discretion, vacate this stay order and reimpose any or all of the stayed portion of the penalty herein ordered. Should no such subsequent decision be made for cause arising during the one-year period, the stay shall become permanent.

The operative date of this decision shall be September 25, 1979. A representative of the Department will call on you on or after September 25, 1979, to pick up the license certificate.

CERTIFICATE

It is hereby certified that on August 16, 1979, the Department of Alcoholic Beverage Control adopted the foregoing as its decision in the proceeding therein described.

Sacramento, California

Dated: August 16, 1979.

/s/ C. E. Cameron, Jr.

C. E. CAMERON, JR.
CHIEF COUNSEL

Before the Department of Alcoholic Beverage Control
of the State of California

File 37664
Reg. 9728

In the Matter of the Accusation Against

Tran-Con Corporation
The Palladium
1031 Kearny Street
San Francisco

on-sale general license

Respondent

under the Alcoholic Beverage Act.

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on October 4, 1979, for decision under Government Code Section 11517(c), and the Department having considered its entire record, including the transcript of the hearings held before Administrative Law Judge Robert S. Kendall on September 11, 13, and 14, 1978, and good cause appearing therefor, the following decision is hereby adopted:

FINDINGS OF FACT

The Findings of Fact as to I; II(a), (b), (d), and (e); III(a), (b), (c), (d), and (f); IV (a) and (b) appearing in the Administrative Law Judge's proposed decision dated

December 26, 1978, are incorporated herein by reference as if set forth in full and are adopted as the Findings of Fact as to I; II(a), (b), (d), and (e); III(a), (b), (c), (d), and (f); and IV(a) and (b) for this decision.

The following additional Findings of Fact are made:

II(c). It was established that on a date not ascertained, but after the events related in (a) and (b) above, Conti contacted the Director of the Department of Alcoholic Beverage Control in Sacramento by phone to express his dismay and anger at what he considered discriminatory enforcement, as well as unequal application, of the rule in Northern California contrasted to Southern California, by Northern California Department of Alcoholic Beverage Control authorities.

Conti testified Director Rice subsequently called him to advise of the results of his investigation of Conti's allegations that Southern California Department of Alcoholic Beverage Control had at least tacitly approved the showing of "Let My People Come", despite purported Rule 143.3 violations. According to Conti, Rice told him the Southern California Department officials advised they had learned of the "Whiskey-A-Go-Go" "Let My People Come" production only three days before it was scheduled to close. Therefore, the Department had permitted the purported rule violations to continue in view of its imminent closing. No rebuttal testimony or evidence concerning this portion of Conti's testimony was received.

It is found that "Whiskey-A-Go-Go" was, in fact, a Department licensed premises when "Let My People Come" played there, and that violations of Rule 143.3 involving

display of genitalia and pubic hair occurred during that production.

It was not established that Rice or any other Department official tacitly, expressly, or in any other manner, thereby approved any violations of Rule 143.3 by Conti during the run of "Let My People Come" in San Francisco.

II(f). Based upon the above, Conti willfully permitted the presentation of "Let My People Come" to violate the rules of the Department of Alcoholic Beverage Control.

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I. By reason of the foregoing facts, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code.

Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that respondent has violated, or permitted the violation of, Title 4, California Administrative Code, Rule 143.3 and 143.3(1)(c).

II. The Department is not, and was not, estopped from the filing of the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent.

III. The motion of the Department of Alcoholic Beverage Control to quash service of process requiring the attendance at the hearing and the testimony of Baxter Rice,

Director, Department of Alcoholic Beverage Control, previously granted, is hereby confirmed.

LICENSEE'S PREVIOUS RECORD

Licensed as above since July 21, 1977, with no record of any disciplinary action. Accusation filed 12/22/77, Reg. 9081, violation Rule 143.3 and 143.3(1)(c) pending. Accusation filed 1/11/78, Reg. 9159, violation Rule 143.3 and 143.3(1)(c) pending. Accusation filed 2/7/78, Reg. 9325, violation Rule 143.3 and 143.3(1)(c) pending.

ORDER

The license is revoked. The revocation is stayed for three (3) years on the following conditions:

1. The license is suspended for forty-five (45) days.

2. No subsequent decision shall be made after hearing or upon stipulation and waiver that cause for disciplinary action has occurred within three (3) years from the effective date of this decision. Should such subsequent decision be made, the Director of Alcoholic Beverage Control may, in his discretion, vacate this stay order and reimpose the revocation. Should no such subsequent decision be made for cause arising during the three-year period, the stay shall become permanent.

The penalty assessed in this matter shall run concurrently with the penalty assessed in Reg. 9325.

The operative date of this decision shall be November 29, 1979. A representative of the Department will call on you on or after November 29, 1979, to pick up the license certificate.

CERTIFICATE

It is hereby certified that on October 4, 1979, the Department of Alcoholic Beverage Control adopted the foregoing as its decision in the proceeding therein described.

Sacramento, California

Dated: October 4, 1979

/s/ C. E. Cameron, Jr.

C. E. CAMERON, JR.
CHIEF COUNSEL

Before the Department of Alcoholic Beverage Control
of the State of California

File 37664
Reg. 9325

In the Matter of the Accusation Against

Tran-Con Corporation
The Palladium
1031 Kearny Street
San Francisco

on-sale general license

Respondent

under the Alcoholic Beverage Act.

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on October 4, 1979, for decision under Government Code Section 11517(c), and the Department having considered its entire record, including the transcript of the hearings held before Administrative Law Judge Robert S. Kendall on September 11, 13, and 14, 1978, and good cause appearing therefor, the following decision is hereby adopted:

FINDINGS OF FACT

The Findings of Fact as to I; II(a), (b), (d), and (e); III(a), (b), (c), (d), and (f); and IV(a) and (b) appearing in the Administrative Law Judge's proposed decision dated

December 26, 1978, are incorporated herein by reference as if set forth in full and are adopted as the Findings of Fact as to I; II(a), (b), (d), and (e); III(a), (b), (c), (d), and (f); and IV(a) and (b) for this decision.

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II(c). It was established that on a date not ascertained, but after the events related in (a) and (b) above, Conti contacted the Director of the Department of Alcoholic Beverage Control in Sacramento by phone to express his dismay and anger at what he considered discriminatory enforcement, as well as unequal application, of the rule in Northern California contrasted to Southern California, by Northern California Department of Alcoholic Beverage Control authorities.

Conti testified Director Rice subsequently called him to advise of the results of his investigation of Conti's allegations that Southern California Department of Alcoholic Beverage Control had at least tacitly approved the showing of "Let My People Come", despite purported Rule 143.3 violations. According to Conti, Rice told him the Southern California Department officials advised they had learned of the "Whiskey-A-Go-Go" "Let My People Come" production only three days before it was scheduled to close. Therefore, the Department had permitted the purported rule violations to continue in view of its imminent closing. No rebuttal testimony or evidence concerning this portion of Conti's testimony was received.

It is found that "Whiskey-A-Go-Go" was, in fact, a Department licensed premises when "Let My People Come" played there, and that violations of Rule 143.3 involving dis-

play of genitalia and pubic hair occurred during that production.

It was not established that Rice or any other Department official tacitly, expressly, or in any other manner, thereby approved any violations of Rule 143.3 by Conti during the run of "Let My People Come" in San Francisco.

II(f). Based upon the above, Conti willfully permitted the presentation of "Let My People Come" to violate the rules of the Department of Alcoholic Beverage Control.

DETERMINATION OF ISSUES

I. By reason of the foregoing facts, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code.

Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that respondent has violated, or permitted the violation of Title 4, California Administrative Code, Rule 143.3 and 143.3(1)(c).

II. The Department is not, and was not, estopped from the filing of the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent.

III. The motion of the Department of Alcoholic Beverage Control to quash service of process requiring the attendance at the hearing and the testimony of Baxter Rice,

Director, Department of Alcoholic Beverage Control, previously granted, is hereby confirmed.

LICENSEE'S PREVIOUS RECORD

Licensed as above since July 21, 1977, with no record of any disciplinary action. Accusation filed 12/22/77, Reg. 9081, violation Rule 143.3 and 143.3(1)(c) pending. Accusation filed 1/11/78, Reg. 9159, violation Rule 143.3 and 143.3(1)(c) pending.

ORDER

The license is revoked. The revocation is stayed for three (3) years on the following conditions:

1. The license is suspended for forty-five (45) days.

2. No subsequent decision shall be made after hearing or upon stipulation and waiver that cause for disciplinary action has occurred within three (3) years from the effective date of this decision. Should such subsequent decision be made, the Director of Alcoholic Beverage Control may, in his discretion, vacate this stay order and reimpose the revocation. Should no such subsequent decision be made for cause arising during the three-year period, the stay shall become permanent.

The penalty assessed in this matter shall run concurrently with the penalty assessed in Reg. 9728.

The operative date of this decision shall be November 29, 1979. A representative of the Department will call on you on or after November 29, 1979, to pick up the license certificate.

CERTIFICATE

It is hereby certified that on October 4, 1979, the Department of Alcoholic Beverage Control adopted the foregoing as its decision in the proceeding therein described.

Sacramento, California

Dated: October 4, 1979

/s/ C. E. Cameron, Jr.

C. E. CAMERON, JR.
CHIEF COUNSEL

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-405

TRAN CON CORPORATION—
d.b.a. THE PALLADIUM,
Petitioner,

v.

THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,
Respondent,

BAXTER RICE, as Director of the
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Real Party in Interest.

Opposition of Respondent to Petition for Writ of Certiorari

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In the Supreme Court of the United States

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No. 80-405

TRAN CON CORPORATION—
d.b.a. THE PALLADIUM,
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v.

THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,
Respondent,

BAXTER RICE, as Director of the
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Real Party in Interest.

Opposition of Respondent to Petition for Writ of Certiorari

PROCEEDINGS BELOW

The decision of the Department of Alcoholic Beverage Control that is the subject of this litigation, suspending petitioner's license for a specific period of time, is reproduced as Appendix B to the petition.

The order of the Court of Appeal, First Appellate District is reproduced as Appendix A of the petition, and the order of the Supreme Court of the State of California denying a hearing is reproduced at the back of Appendix A to the petition.

JURISDICTION

Jurisdiction is asserted by petitioner under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

Respondent disagrees with petitioner's characterization of the questions presented, and believes they are more accurately phrased as follows:

1. Is the Department of Alcoholic Beverage Control licensing and regulatory scheme unconstitutional under the First Amendment as it permits the Department of Alcoholic Beverage Control to revoke or suspend a license upon a determination that a licensee is permitting entertainment in which there is a displaying of complete nudity, which the department has determined by regulation to be contrary to public welfare and morals?

2. Is there substantial evidence in the record to support the finding by the Department of Alcoholic Beverage Control that petitioner was not the victim of arbitrary and selective enforcement of the regulation at issue, and thereby there was no denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

Title IV of the California Administrative Code, section 143.3, at issue in this case, reads as follows:

> "Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale licensee shall be held at any premises where such conduct or acts are permitted.
>
> "Live entertainment is permitted on any licensed premises except that:
>
> "(1) No licensee shall permit any person to perform sexual acts of or acts which simulate:
>
> (a) Sexual intercourse, masturbation, sodomy, beastiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or the fondling of the breast, buttocks, anus, or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breast and/or buttocks are exposed to view perform only upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect to the invalid provision or application and to this end the provisions of the rule are severable."

STATEMENT OF THE CASE

Petitioner's statement of the case generally sets forth with accuracy the chronology of events and facts. To the extent they are inaccurate or incomplete respondent will comment below.

The imposition of the discipline of 30 days suspension of the license has been imposed, commencing on September 4, 1980.

First, as to the facts relating to the alleged denial of equal protection, it was found specifically by the Department of Alcoholic Beverage Control in its administrative hearing that the Department had not "arbitrarily, unjustly or unequally applied Rule 143.3" against the licensee. (Determination of Issues No. II.) The Appeals Board affirmed. (Page A-42 of pet. br.) The agent who ordered the investigation of the licensee, a Mr. Gin, testified he had no knowledge about a similar performance in Los Angeles, (RT II, 63-64); that he never received instructions *not* to investigate and enforce Rule 143.3 as to any licensed premises (RT II, 78); and that the instructions he received from his superiors as to the instant licensee were the same as to any other violator (RT II, 80-81). He, the agent, conducted checks of other licensees in the same geographical area as licensee during the same month he noted this licensee's violations. (RT II, 82.) Other investigators within Gin's jurisdiction had also checked out the area for Rule 143.3 violations. (RT II, 18.) There was thus ample evidence to support the finding that petitioner had not been the victim of unequal protection of the laws.

As to the conduct which triggered discipline in this case, there is no dispute as to the facts in this case, i.e., the fact that several performers appeared, during the "performance" fully nude, with exposure of genitalia and pubic hair. (A-13, A-27, pet. br.) Department officials had visited the premises during a performance and had advised the licensee that the exposure of genitalia and pubic hair were violations of Rule 143.3, and that, if continued, disciplinary action would be necessary. Notwithstanding this forewarning, the licensee declined to comply, and subsequently charges were filed. (A-9 and A-14 of pet. br.) During the "performances" alcoholic beverages were served at the establishment. (A-14, pet. br.)

The Alcoholic Beverage Control Appeals Board affirmed the decision of the Department on appeal, and found the constitutional challenges to be without merit.

REASONS WHY WRIT SHOULD NOT BE GRANTED

ARGUMENT

I. The First Amendment Issues Being Raised Were Disposed of in the La Rue Case

Petitioner correctly points out that respondent has relied on the case of *California v. La Rue* 409 U.S. 109, 93 S.Ct. 390 (1972) in disposing of his contentions.

This Honorable Court sustained the validity of the regulation here being challenged. It was not found to be overbroad or a violation of the First Amendment. Notwithstanding this decision, petitioner alleges that somehow the *La Rue* decision has lost some of its vitality. He asserts an *ipse dixit* statement, arguing that the agency cannot apply the regulation unless it concurrently finds disruptive and raucous behavior. (Pet. Br., pp. 7, 8.) Such a construction of the regulation would be absurd, for it would require continuing surveillance of the Department's limited number of enforcement agents who would be powerless to enforce the regulation until they observed some of the very conduct which precipitated the adoption of the regulation in the first place. Nor is there any case or statutory authority to support such a premise.

As this Court set forth expressly in the *La Rue* decision:

> "References to the transcript of the hearing submitted by the Department to the District Court indicated that in licensed establishments where "topless" and "bottomless" dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with

> women entertainers; customers engaged in public masturbation, and customers rolled currency either directly into the vigina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers in the vaginal areas of female performers were reported to have occurred.
>
> "Prostitution occurred in and around some such licensed premises and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself and assult on police officers took place on or immediately adjacent to such premises." *Id.* at 111.

This Court noted that the conclusions drawn by the Department, after its public hearings and the evidence, was a rational one. *Id.* 116. The concept of accomplishing the same results by alternative means (such as excluding patrons already partially intoxicated) was flatly rejected, and the language provides an appropriate answer to petitioner's argument that raucous behavior must be a condition precedent.

> ". . . But wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment. . . . The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one under the holdings of our prior cases. (Citing *Williamson v. Lee Optical Co.* 348 U.S. 483, 487-488 (1955)." *Id.* 115.

Petitioner's other argument appears to rest on an assertion that, because the nudity herein was incorporated into a theatrical production it becomes a restriction on freedom

of expression, more so than in something like merely waitressing. (Pp. 10-11, pet. br.) In reliance thereto, he cites a California appellate court decision, *Locker v. Kirby* 31 Cal. App. 3d 520 (1973). But his arguments here were answered both in *La Rue* and in the California Supreme Court case of *Crownover v. Musick* 9 Cal.3d 405 (1973).

In *Crownover* the issue revolved around municipal ordinances which proscribed certain forms of dress in public places. In upholding the ordinances against a constitutional attack couched on the First Amendment, the Court noted, at page 425 of its decision:

> "It is clear that these provisions of the ordinances are directed at conduct—topless and bottomless exposure—and not at speech or at conduct which is 'in essence' speech or 'closely akin to speech'. A common sense construction (citations omitted) of the pertinent provisions is that they proscribe nudity in specified public places. *They do not prohibit entertainment but merely enjoin that if the entertainer or performer offers it, he or she must have some clothes on.* In a word the ordinances regulate conduct." (Emphasis added.) 9 Cal.3d at 425.

Furthermore, this Honorable Court indicated the continuing vitality of its *La Rue* decision in the case of *Doran v. Salem Inn, Inc.* 422 U.S. 922, 95 S.Ct. 2561 (1975), where it noted, at pages 2568-69:

> "Although the 'customary' type of nude dancing may involve only the barest minimum of protected expression we recognize in *California v. La Rue* (1972) 409 U.S. 109, 118, that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *La Rue,* however, we concluded that the broad powers of the states to regulate the sale of liquor, conferred by the Twenty-first Amendment, *outweighed any First Amendment*

interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor licensing program. (Emphasis added.) 95 S.Ct. 2568-69.

For the above reasons, the First Amendment contention is devoid of any merit.

II. The Law and the Facts Were Properly Applied to the Unequal Protection of Law Argument

As set forth by way of example in respondent's statement of the case, there was ample evidence before the administrative agencies to justify the conclusion that there was no purposeful and intentional unequal enforcement of the law in this case. Petitioner had the burden of proof of establishing the defense of discriminatory enforcement, and he failed in this task. *Snowden v. Hughes* 321 U.S. 1, 11, 88 L. Ed 497 (1944); *Murgia v. Municipal Court* 15 Cal.3d 286, 305 (1975); *Ehrlich v. McConnell* 214 Cal. App. 2d 280, 288 (1963).

Finding No. II of the Department of Alcoholic Beverage Control expressly set out that: "The Department is not, and was not, estopped from filing the accusations against the respondent. The Department has not arbitrarily, unjustly, or unequally applied Rule 143.3 against the respondent."

Petitioner has attempted to cite other evidence in the record which would justify a contrary conclusion, but under well settled principles of appellate law, a reviewing court will not reweigh the evidence of the trier of fact below. *Kirby v. Alcoholic Beverage Control Appeals Board* 7 Cal. 3d 433 (1972). If the Court desires those portions of the administrative record supportive of Mr. Gin's testimony it can be supplied quickly by respondent.

CONCLUSION

Respondent prays that the Petition for Writ of Certiorari be denied. Petitioner most assuredly has failed to meet the standards of Rule 19, (1)(a), U.S. Supreme Court Rules.
DATED: October 6, 1980

Respectfully submitted,

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